

Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing

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A Thesis Submitted to the Faculty of Graduate Studies

In Partial Fulfillment of the Requirements for the Degree of Master of Laws

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September 2019

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## **Abstract**

This thesis explores whether and how criminal sentencing may provide an effective platform to address and remedy some of the structural violence that contribute to Black mass incarceration. Introducing race at sentencing represents an attempt to promote, at the back end of the criminal process, a discussion that is generally obscured at earlier stages. In critically assessing the merits of an explicit discussion about race, this thesis considers the “paradox of visibility”: in some contexts, a focus on Blackness operates to disadvantage African Canadians interfacing with the criminal justice system; while in other contexts, a refusal to focus on Blackness can support the myth of colour blindness and racial neutrality in the criminal justice system. Introducing race at the sentencing phase is a challenging, and perhaps even a paradoxical, manoeuvre – but one that may also be logical, insofar as we are operating within the cruel illogic of white supremacy.

## **Dedication**

To my children, from whom collectively I draw all my strength. Without them, there is no me.

### **Acknowledgments**

I want to thank my supervisor Professor Palma Paciocco for all her support, encouragement, and, most importantly, for always pushing me to think harder and more critically about law and my place within it. I am also grateful for the support that I received from the Graduate Program in Law, especially from the GPD, Professor Sonia Lawrence who provided me with invaluable guidance.

Much thanks to all my interview participants for letting me into your worlds and allowing me to share your stories. I would like to especially thank the ex-offender participants for sharing their struggles with me. I aim to continue telling your stories until it is truly heard.

I would like to send a special thanks to my Uncle Alton, who predicted a long time ago, even when I did not share his faith, that I was destined for more. Nuff luv and respect – Big up yuhself mi uncle!

Last, but certainly not least, I would like to take some time to thank the most important woman in my life, my mother, Christine Hamilton, who has been both mother and father to me. Thank you, mummy, for teaching me the importance of having a good education and for cultivating within me an unquenchable thirst for knowledge. Mummy, you taught me that “silver and gold will vanish away, but a good education will never decay.” Well, as usual you were right! It was my love of knowledge that saved my life and has sustained me over the years. Mummy, I also remember and have heeded your sage advice: “to take each of my disappointments for an appointment.” This project is my attempt at doing just that.

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## **Chapter One: Introduction**

The criminal justice system is instrumental in manufacturing ‘truths’ and ascribing meaning to Black bodies.<sup>1</sup> Typically, Black bodies are bounded by notions of risk, violence, and dangerousness, which are harnessed as justifications for the harsh and degrading treatment imposed on Black Canadians<sup>2</sup> by the criminal justice system.<sup>3</sup> Put another way, the criminal justice system not only acts upon stereotypical notions about Black Canadians; it is also instrumental in their creation. To the extent that Black Canadians are stereotyped as “dangerous,” “violent,” and “criminal,” they are disproportionately likely to attract scrutiny and harsh treatment from criminal justice actors like police, prosecutors, and judges.<sup>4</sup> A predictable result is the overrepresentation of Black Canadians among criminally accused persons and offenders.<sup>5</sup> That overrepresentation, in turn, serves to validate the unfavourable stereotypes about Black Canadians that it helps to produce. In essence, then, the risk that is coded on Black bodies becomes self-reinforcing through a negative feedback loop: as more Black people are criminally

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<sup>1</sup> Barrington Walker, *Race on Trial: Black Defendants in Ontario’s Criminal Courts, 1858-1958* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2010) at 20.

<sup>2</sup> The term African Canadian, and Black, while used interchangeably throughout this document, have different historical values. There is no culture in colour, therefore the term Black does not reflect the deep, vibrant histories and cultural capital of peoples of African descent.

<sup>3</sup> *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2018) at 8; Camisha Sibblis, “Expulsion Programs as Colonizing Spaces of Exception” (2014) 21:1 *Race, Gender & Class* 64. Professor Sibblis relies on Sherene Razack’s idea that risk is read on the Body and argues that “Dominant ideology about the black body belies how behaviours are interpreted and used to gauge propensity for harmful behaviours and predict future harm, particularly because black bodies are believed to be innately savage and violent”. See generally, Sherene Razack, *Casting out: the eviction of Muslims from western law and politics* (Toronto: University of Toronto Press, 2008).

<sup>4</sup> *A Collective Impact*, supra note 3; *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995); David M. Tanovich, “The Colour of Justice: Policing Race in Canada” (Toronto: Irwin Law, 2006); Akwasi Owusu-Bempah, “Race and policing in historical context: Dehumanization and the policing of Black people in the 21st century” (2017) *Theoretical Crimin.* 21:1 23.

<sup>5</sup> *A Collective Impact*, supra note 3; David M. Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 *S.C.L.R.* (2d) 655; *R v Le* 2019 SCC 34 at 90 – 97. [Hereinafter “Le”]

punished, more Black people are regarded as deserving of criminal punishment, and vice versa. Ample social science data shows the depth and magnitude of this vicious phenomenon.<sup>6</sup> However, despite recognition of the overwhelming evidence of the role that anti-Black racism plays in the criminal justice system, and widespread agreement on the need to redress it, Black Canadians continue to receive unfair treatment at all stages of the criminal justice process. This unfairness is especially acute during the sentencing phase.<sup>7</sup>

Criminal sentencing is a form of structural violence that is a salient feature of the relationship between Black Canadians and the State.<sup>8</sup> Indeed, punishment and Black lives have long existed in an antagonistic struggle. There is reason to suspect that this relationship found its genesis in Black slavery and is currently sustained through the pernicious and racist myths, stereotypes and attitudes that code Black bodies as dangerous. Some Canadian scholars assert that there is a clear genealogy from Black slavery to the current invidious presuppositions that underlie the value and corresponding treatment of Black bodies.<sup>9</sup> According to Afua Cooper, “slavery was the context in which current race relations were created.”<sup>10</sup> Slavery was justified, in part, by the belief that Black people were inferior and dangerous, and hence correctly the subject

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<sup>6</sup> Toni Williams, “Sentencing Black Offenders in the Ontario Criminal Justice System”, in Julian V Roberts and David P Cole, *“Making sense of sentencing”* (University of Toronto Press, 1999) 200; Akwasi Owusu-Bempah, “Race, Crime, and Criminal Justice in Canada” in Sandra M. Bucerius and Michael Tonry, *The Oxford handbook of ethnicity, crime, and immigration* (Oxford: Oxford University Press, 2014); Julian V Roberts & Anthony N Doob, “Race, Ethnicity, and Criminal Justice in Canada” (1997) 21 *Crime & Justice: A Rev of Research* 469.

<sup>7</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4 at chapter 8.

<sup>8</sup> See generally Clayton Mosher, “The reaction to Black Violent Offenders in Ontario -1892-1961: A Test of the Threat Hypothesis” (1999) 14:4 *Sociological Forum* 635; Shelley Trevethan and Christopher J. Rastin, “A Profile of Visible Minority Offenders in the Federal Canadian Correctional System”(2004) Research Branch Correctional Service of Canada <[http://www.csc-scc.gc.ca/research/r144-eng.shtml#LinkTarget\\_24738](http://www.csc-scc.gc.ca/research/r144-eng.shtml#LinkTarget_24738)>; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4; Julia Sudbury, “Celling black bodies: black women in the global prison industrial complex” (2002) 70 *feminist review* at 59-60; See also Toni Williams, *supra* note 6; Anne-Marie Singh & Jane B. Sprott, “Race Matters: Public Views on Sentencing” (2017) 59:3 *Can J of Crimin and Crim Justice* 285.

<sup>9</sup> See generally Milan Hrabovsky, “The Concept of “BLACKNESS” in Theories of Race” (2013) 22:1 *Asian and African Studies* 65; See also Samuel L. Hart, “Axiology--Theory of Values” (1971) 32:1 *Philosophy and Phenomenological Research* 29.

<sup>10</sup> Afua Cooper, “Acts of resistance: Black men and women engage slavery in Upper Canada, 1793-1803” (2007) 99:1 *Ontario History* at 7.



of formal control.<sup>11</sup> After slavery was abolished, this belief persisted, and the over-criminalization of Black bodies became a conspicuous method of continuing to control and subjugate Black people.<sup>12</sup> This phenomenon remains largely unaltered today.<sup>13</sup> Current statistics and studies on race and criminal sentencing find similar disparities in sentencing outcomes for Black Canadians as existed in the decades following abolition.<sup>14</sup> However, limited scholarly attention has been devoted to the impact that anti-Black racism has on the perception of judges tasked with sentencing Black bodies.<sup>15</sup> There is, however, reason to conclude that some judges engage in differential sentencing based on race.<sup>16</sup>

Criminological research data suggests that “race-based thinking impacts the public’s perception of sentencing appropriateness.”<sup>17</sup> This research has found that the public generally viewed Black offenders as being more dangerous than their similarly situated white counterparts and consequently deserving of harsher and longer sentences.<sup>18</sup> Thus, the iconography of the dangerous Black man and its supporting narratives (i.e. so-called biological and social predisposition to criminality) remain significant considerations in the sentencing of Black bodies. In short, the contemporary legacies of slavery include the sophisticated structural and systemic violence levelled against Black bodies by the criminal justice system. Its persistence may

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<sup>11</sup> Ken Donovan, “Slavery and Freedom in Atlantic Canada’s African Diaspora: Introduction, (2014) XLIII: 1 *Acadiensis* at 109.

<sup>12</sup> Robyn Maynard, *Policing Black Lives State Violence in Canada from Slavery to the Present* (Black Point, NS: Fernwood Publishing 2017); Clayton Mosher, *supra* note 8.

<sup>13</sup> *A Collective Impact*, *supra* note 3.

<sup>14</sup> Jamil Malakieh, “Adult and youth correctional statistics in Canada 2016/2017” (2018) Canadian Centre for Justice Statistics, <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=LI8Q630j>>; Emerson Douyon, “Ethnocultural Minorities and the Canadian Correctional System” (2016) Correctional Service Canada <<https://www.csc-scc.gc.ca/about-us/006-4000-eng.shtml>>; Shelley Trevethan and Christopher J. Rastin, *supra* note 8; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4; Barrington Walker, *supra* note 1; Clayton Mosher, *supra* note 8.

<sup>15</sup> Sharyn Roach Anleu, Russell Brewer & Kathy Mack, “Locating the Judge within Sentencing Research” (2017) 6:2 *International Journal for Crime, Justice and Social Democracy* 46; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4 at Chapter 8.

<sup>16</sup> *Ibid.*

<sup>17</sup> Anne-Marie Singh & Jane B. Sprott, *supra* note 8.

<sup>18</sup> *Ibid.*

indicate an unrelenting institutional imperative to oppress and punish Black bodies. Indeed, anti-Black racism in the Canadian criminal justice system constitutes a longstanding, ongoing crisis that must be addressed. In what follows, this thesis will focus on criminal sentencing as both a fundamental cause and effect of this crisis and as a possible locus of reform.

Criminal sentencing is a platform on which pernicious notions of Blackness can either be concretized or attenuated. Criminal sentences are not only communicated to the offender, but also the wider community.<sup>19</sup> Depending on how they are constructed, they can either signal judicial endorsement of egregious notions of Blackness, or official attempts at denouncing anti-Blackness. This thesis takes as its starting point the understanding that criminal sentencing functions as a form of structural violence that serves to reinforce anti-Black racism in Canada.<sup>20</sup> Criminal sentencing is a central feature of the criminal process and involves a dynamic and complex web of legal rules and procedures.<sup>21</sup> This thesis will investigate how the fundamental principle of proportionality, enshrined in section 718.1 of the *Criminal Code*<sup>22</sup>, can be calibrated to promote fairer sentences for Black offenders. Many scholars who study race and crime have sought ways of reducing the over-incarceration of African Canadians by, *inter alia*, redressing the known problem of disproportionate sentencing.<sup>23</sup> However, sentencing reform is, at best, a partial solution to the problem of the over-criminalization and disproportionate incarceration of African Canadians and the broader problem of anti-Black racism.<sup>24</sup>

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<sup>19</sup> See generally R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986).

<sup>20</sup> Akwatu Khenti, "The Canadian war on drugs: Structural violence an unequal treatment of Black Canadians" (2014) 25 *International Journal of Drug Policy* 190; David M. Tanovich, "Race, Sentencing and the "War on Drugs"" (2004) 22 *C.R. (6th)* 45; Toni Williams, *supra* note 6; Sonia N Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56:4 *UTLJ* 285.

<sup>21</sup> Steve Penney *et al*, *Criminal Procedure in Canada*, (Markham: Lexis Nexis, 2011) at Chapter 17.

<sup>22</sup> *Criminal Code*, RSC 1985, c C-46.

<sup>23</sup> Carmela Murdocca, *To right historical wrongs: race, gender, and sentencing in Canada* (UBC Press, 2013); Toni Williams, *supra* note 6.

<sup>24</sup> Kent Roach, "Making Progress on Understanding and Remediating Racial Profiling" (2004) 41:4 *Alta L Rev* at 903.

It is generally accepted that one of the reasons for the over-incarceration of African Canadians is the fact that Black offenders often receive disproportionately higher criminal penalties compared to their similarly-situated white counterparts;<sup>25</sup> and as such, one goal of progressive criminal justice reform should be the promotion and facilitation of proportionate sentences for African Canadians. Despite this fact, almost no work has been done on the question of how we might promote an anti-racist agenda through criminal sentencing. Not simply by treating Blackness as something that is implicitly or unconsciously and unjustly, aggravating; but by explicitly attending to it as a potential mitigating factor.<sup>26</sup> In that vein, this thesis will investigate an emerging strategy for promoting proportionate sentencing; namely, Cultural Impact Assessment Reports (“CIARs”) or Impact of Race and Culture Reports (“IRCARs”)<sup>27</sup>, which are designed to emphasize specific cultural, social, and political mitigating factors that ought to be considered in the sentencing of African Canadian offenders.<sup>28</sup> One aim of this thesis, therefore, is to assess whether CIARs/IRCARs can be salutatory in the context of our current proportionality-based sentencing regime. It will, therefore, be necessary to take for granted that the current Canadian sentencing regime, which is premised on the fundamental principle of proportionality and retribution is desirable and can effectively redress the current disparities in Black incarceration rates. In essence, sentencing innovation via IRCARs/CIARs will only find

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<sup>25</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4 at Chapter 8.

<sup>26</sup> There were some scholarly discussions around Blackness, gender and sentencing in the wake of the *R v Hamilton*, 2004 CanLII 5549 (ON CA) decision which will be discussed in detail below. However, for the most part these articles did not attempt to work out how Blackness could be harnessed to achieve sentencing proportionality. [Hereinafter “*Hamilton*”]

<sup>27</sup> These reports are referred to as CIARs in Nova Scotia and IRCARs in Ontario.

<sup>28</sup> Barbara A. Hudson, “*Mitigation for socially deprived Offenders*”. In: A. von Hirsch and A. Ashworth, ed., *Principled Sentencing: Readings on Theory and Policy*, 2nd ed. (Oxford: Hart Publishing 1998) at 205-208; Michael Plaxton, “*Nagging Doubts About the Use of Race (and Racism) in Sentencing*”, (2003) 8 C.R. (6th) 299; See generally Dale E. Ives, “*Inequality, Crime and Sentencing: Borden, Hamilton and the Relevance of Social Disadvantage in Canadian Sentencing Law*” (2004), 30 Queen’s L.J. 114 – 155.

success if they can properly interface with our current proportionality-based sentencing framework.

Proportionality is the touchstone principle in Canadian sentencing law.<sup>29</sup> Penologists assert that proportionality has two dimensions: cardinal and ordinal proportionality.<sup>30</sup> Ordinal proportionality suggests that similarly situated offenders should be treated alike and that if we compare two offenders, the more blameworthy should attract a more substantial sentence. As such, ordinal proportionality encompasses concepts of equality: if there are two comparably blameworthy offenders (one white, one Black) and the Black offender receive a more substantial sentence, then there is a failure of equality—and a failure of ordinal proportionality. To a large extent, ordinal proportionality also assumes retributivism: it regards different levels of blameworthiness as a legitimate basis (or perhaps the only legitimate basis) for assigning different sentences. The link between proportionality and blameworthiness is made more evident still by the concept of cardinal proportionality, which seeks an absolute correspondence between wrongdoing and blameworthiness.<sup>31</sup>

A fundamental tenet of the retributive project is blameworthiness - specifically the proper alignment of blame and desert.<sup>32</sup> From a retributivist perspective, an offender must be deserving of his/her punishment.<sup>33</sup> Supporters of the theory assert that retribution is theoretically distinct from vengeance.<sup>34</sup> In *R v M. (C.A.)*, the Supreme Court of Canada (“the Court”), in holding that retribution is a legitimate principle of Canadian sentencing law, explained that retribution:

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<sup>29</sup> *R v Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 at 37. [Hereinafter “*Ipeelee*”]

<sup>30</sup> Andrew von Hirsch, “Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”” (1990) 1:2 Criminal Law Forum at 282.

<sup>31</sup> *Ibid* at 282-289.

<sup>32</sup> *Ibid* at 262-263.

<sup>33</sup> Andrew von Hirsch, *ibid* at 289-290; *R v M. (C.A.)*, [1996] 1 SCR 500, 1996 CanLII 230 (SCC).

<sup>34</sup> *R v M. (C.A.)*, *ibid* at 80.

is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions.<sup>35</sup>

Given the explicit endorsement of the Court, it is axiomatic that the modern institution of criminal sentencing is grounded in retributivism. Retributivism in turn, however, rests on the fundamental principle of proportionality. The principle of proportionality, as it is conceptualized and entrenched in Canadian sentencing law, functions as a restraint mechanism against grossly severe punishments or those that are unjustifiably lenient or merciful.<sup>36</sup> Proportionality supposedly aims at temperance and fairness.<sup>37</sup> For a punishment to be considered fair and just, it must be proportionate to the gravity of the offence and moral blameworthiness of the offender. An offender ought to be punished *fairly* - no more or less than he deserves. Fairness thus becomes the *sine qua non* of criminal punishment, as any actual or perceived unfairness threatens to throw the entire sentencing apparatus into disrepute.<sup>38</sup> It is within that vein that this thesis aims to address the following question: is the impact of structural violence against Black people a relevant factor for consideration in determining a fair and proportionate sentence?

This thesis will also discuss the paradox of visibility. In some contexts, a focus on Blackness may operate to disadvantage African Canadians interfacing with the criminal justice system, while in other contexts, a refusal to focus on Blackness may support the myth of colour blindness and racial neutrality in the criminal justice system.<sup>39</sup> Therefore, introducing race at the sentencing phase is a challenging, and perhaps even a paradoxical, manoeuvre – but one that

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<sup>35</sup> *Ibid* at 79 (not my emphasis).

<sup>36</sup> *R v M. (C.A.)*, *ibid* at 80; Richard G. Fox, "The Meaning of Proportionality in Sentencing" (1994) 19(3) *Melbourne U L Rev* at 495.

<sup>37</sup> Richard G. Fox, *ibid* at 492.

<sup>38</sup> *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81 (SCC) at 129.

<sup>39</sup> See generally Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, (New York: NYU Press 2001).

may also be logical, insofar as we are operating within the cruel illogic of white supremacy. The erasure of race in sentencing jurisprudence may have arguably provided the catalyst for the current CIAR/IRCAR movement.

Defence lawyers who introduce race and culture at the sentencing phase strive to accomplish at the back-end of the criminal process a discussion that is generally obscured at earlier stages.<sup>40</sup> It has only been in recent years that defence lawyers, starting in Nova Scotia, have begun to meaningfully address the race and culture of their Black clients before sentencing courts.<sup>41</sup> The trend has spread to Ontario, particularly in the Greater Toronto Area.<sup>42</sup> There has, however, been no clear objective expressed by the Black community, or by defence lawyers, with regards to the desired goal or impact to be achieved by the introduction and mobilization of Blackness, through the expanded use of IRCARs/CIARs, before sentencing courts. For instance, is the goal to edify sentencing judges about the pernicious nature of anti-Black racism in Canadian society broadly, and more specifically, within the criminal justice system? Anti-Black racism is a notorious fact that has gained a high degree of judicial consensus.<sup>43</sup> Even the most conservative-minded jurist would be deemed unreasonable if he or she were to deny its existence.

However, recognition of a notorious fact does not necessarily lead to the ameliorative effect that is desired or expected to follow the facts' recognition and acknowledgement. However, while race talk may only marginally impact sentencing outcomes and redress the broader issues of anti-Black racism, it is possible that when race-based evidence is introduced in

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<sup>40</sup>Kent Roach, *supra* note 24 at 903; David M. Tanovich, "The Further Erasure of Race in Charter Cases" (2006) 38 C.R. (6th) 84; Julie Jai & Joseph Cheng, "The Invisibility of Race in Section 15: Why Section 15 of the Charter Has Not Done More to Promote Racial Equality" (2006) 5 J.L. & Equality 125.

<sup>41</sup>*R v "X"*, 2014 NSPC 95.

<sup>42</sup>*R v Jackson*, 2018 ONSC 2527.[Hereinafter "*Jackson*"]

<sup>43</sup>*R v Parks*, [1993] O.J. No. 2157, 84 C.C.C. (3d) 353; *Le*, *supra* note 5 at 89-97.

sentencing, it repositions the centrality of race as a factor for judicial consideration which would have otherwise been relegated to the periphery. CIARs/IRCARs ask judges to focus on the colour of the accused's skin so that they will focus on the content of the accused's character. By considering the lived realities of Black people, and that of the specific offender, sentencing judges, may learn to disabuse themselves of pervasive Black stereotypes. There will undoubtedly be some judicial resistance to this methodological shift given the general discomfort of judges to engage in race talk. This resistance contributes to the frustration of litigating and *existing* in a system that is now willing to recognize systemic racism but is still reluctant to recognize racism in any one individual case. In some sense, the promise and pitfalls of CIARs/IRCARs parallel the promise and pitfalls of criminal procedure cases that have created space for acknowledging racism.<sup>44</sup> For example, in *Le* the Court may have potentially lifted the judicial embargo on race-based *Charter*<sup>45</sup> litigation, particularly in *Charter* cases engaged by police encounters.<sup>46</sup> Before *Le*, the Court had only ever marginally engaged in a race-based analysis of the *Charter* rights that were engaged by police conduct.<sup>47</sup>

However, while the shift in the Court's detention analysis introduced by *Le* is laudable, there is the risk that *Le* may not deliver on its promise. There is the real risk that defence lawyers may inadvertently overemphasize race in every case concerning the detention of a racialized person. For instance, defence lawyers should eschew a practice that seeks to generate a rebuttable presumption that racialized individuals are immediately detained upon contact with police. Despite overwhelming evidence of biased policing in racialized communities, such an

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<sup>44</sup> Danardo S. Jones, Lifting the Judicial Embargo on Race-Based Charter Litigation: A Comment on *R. v. Le*, (2019) 67(1&2) C.L.Q. 42.

<sup>45</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [“the *Charter*”].

<sup>46</sup> *Le*, *supra* note 5; *Supra* note 44.

<sup>47</sup> David M. Tanovich, *supra* note 40; Julie Jai & Joseph Cheng, *supra* note 40.

uncoordinated and unprincipled mobilization of race may serve to diminish the precedential potency of *Le*. Such an approach may also inadvertently and collectively generate a “*boy who cried wolf*” type resistance to race-based s. 9 analyses.<sup>48</sup> A similar risk may exist regarding the routine use of CIARs/IRCARS. Defence lawyers must be strategic in their deployment of race during sentencing to avoid indictments for playing the so-called “race card.” However, if deployed conscientiously but unapologetically, CIARs/IRCARS may have the potential to achieve proportionate sentences for Black Canadians.

Another potential pitfall is whether CIARs/IRCARS are worth their cost, given the risks of individual (re)traumatization and the unintended reinforcement of stereotypes. Therefore, defence lawyers must use caution in deciding whether to have one generated. Moreover, to the extent that defence lawyers are proposing sentencing reform centred on the use IRCARS/CIARs, they must be prepared to acknowledge that these reports are not a “no-cost” or “low-cost” proposition for the individuals and communities they seek to benefit. While IRCARS/CIARS are potentially transformative documents, their production may be (re)traumatizing for the offenders who are asked to reveal and revisit personal experiences with deprivation and trauma and may pose the risk of reinforcing stereotypes.

IRCARS/CIARS can be criticized for attempting to create a lower standard of moral blameworthiness premised simply on the mitigating quality of Blackness. Blackness, consequently, may be inadvertently transformed into a monolithic reality that subsumes all Black Canadians. This *packaging* of Blackness may serve to create an inaccurate and dangerously misleading depiction of the varied and complex meanings ascribed to the Black experience. While the introduction of these reports is a welcomed attempt at sentencing reform, defence

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<sup>48</sup>*Le*, *supra* note 5; *Supra* note 44.



lawyers must consider whether or how much focus should be placed on an offender's Blackness. In the cases reviewed for this thesis, it was found that defence lawyers, consciously or unconsciously, placed a disproportionate amount of emphasis on the links between the offender's Blackness and his or her interactions with the criminal justice system and other structures of violence (i.e. education, child welfare). This intense focus may inadvertently operate to reinforce or reify certain pernicious notions about the inherent deviance of Black people. Therefore, sentencing reform - and especially sentencing reform involving the use of IRCARs/CIARs - can only be justified if its positive material impacts on communities and individuals outweigh its costs.

CIARs/IRCARs may reinforce the idea that blameworthiness is a central measure for punishment, and hence that retributivism is a legitimate sentencing theory. In this way, CIARs/IRCARs seek to operate within our current sentencing paradigm. They do not participate in the more radical structural critique that, for example, prison abolitionists suggest we should bring to bear on the very institution of criminal justice.<sup>49</sup> Moreover, in the Canadian social and political context, the institution of retributive and proportionality-based punishment cannot be disentangled from racism and, therefore, cannot coexist with genuine racial equality.<sup>50</sup> As Paul Butler, writing in the American context, remarked: "criminal law is racist because it is an instrument of white supremacy."<sup>51</sup> It may be, therefore, reasonable to take the position that any effort at sentencing reform that preserves the fundamental principle of proportionality will

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<sup>49</sup> William Calathes, "Racial capitalism and punishment philosophy and practices: what really stands in the way of prison abolition", (2017) 20:4 Contemporary Justice Review.

<sup>50</sup> Michelle Alexander, "The New Jim Crow: Mass Incarceration in an Age of Colorblindness" (New York: The New Press, 2001); Paul Butler, "Racially based jury nullification: black power in the criminal justice system" (1995) 105:3 Yale L.J. 677. I acknowledge that these sources are American, and, insofar as they are grounded in a particular national history, they are not entirely transferrable to the Canadian context – however, the basic insight they express is also compelling in the Canadian context.

<sup>51</sup> Paul Butler, *ibid.*

ultimately prove inimical to Black liberation and the eradication of systemic anti-Black racism. However, CIARs/IRCARs may merit consideration as a “*lesser evil* option” that strives to work within our current paradigm. In some sense, they seek to dismantle the master’s house with the master’s tool.<sup>52</sup>

There are concerns, however, that a sentencing-focused response may not correctly address nor redress the broader problem of institutional racism. Anti-Black racism cannot be tackled on one front; instead, it requires an approach that considers the many layers of structural violence that inform Black Canadians experience with the State. Indeed, the various institutions of structural violence are intricately interwoven and feed each other. It is thereby imprudent to attempt to apprehend any one of these institutions separately without acknowledging the influence that they may exert on each other. For example, race scholars have discovered that there is a causal link between the education system and criminal justice. They have dubbed this phenomenon as the ‘school-to-prison pipeline.’<sup>53</sup> Some scholars have even analogized schools to carceral spaces<sup>54</sup> – a prelude to what will inevitably befall students that are the victims of discriminatory and punitive education practices. Given the relationship between these various institutions, it is crucial for scholars analyzing race, particularly Blackness, to eschew adopting a myopic lens. It is, however, beyond the scope of this thesis to comprehensively analyze the thorny intersecting relationships between these various structures of violence. Although criminal sentencing is the primary focus of analysis, this thesis will, where necessary, draw on the experiences of Black people in their interactions with other systems of violence.

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<sup>52</sup> *Ibid* at 680; See generally Audre Lorde, “The Master’s Tools Will Never Dismantle the Master’s House” (1984) in *Sister Outsider: Essays and Speeches*. Ed. (Berkeley, CA: Crossing Press, 2007) at 110-114.

<sup>53</sup> Abigail Tsionne Salole & Zakaria Abdulle, “Quick to Punish: An examination of the school to prison pipeline for marginalized youth” (2015) 72/73 *Canadian Review of Social Policy* 125.

<sup>54</sup> See generally Camisha Sibblis, *supra* note 3.

## **Section A: Roadmap**

This thesis aims to explore how much consideration should be accorded to Blackness in the sentencing of Black offenders. In that vein, if Blackness is accepted as a crucial contextual factor for consideration, what impact should it have on sentence outcomes? Importantly, can proportionality be achieved through the acknowledgment of anti-Blackness? The thesis will also demonstrate how conflicting notions of Blackness may impact sentencing determinations. It will argue that when Blackness is over-emphasized at sentencing, defence lawyers risk compounding already entrenched notions of anti-Blackness in the criminal justice system. Indeed, an unprincipled mobilization of Blackness may operate as an affront to the dignity of Black Canadians. There is the reason, however, to hope that an increase in race talk at sentencing may result in the reduction of Black over-incarceration. This approach raises an important question, namely: whether criminal sentencing reform can be achieved through the extensive use of IRCARs/CIARs. Put another way, does criminal sentencing provide an effective platform to address and remedy anti-Black racism and other forms of structural violence that contribute to Black mass incarceration?

This thesis will be divided into four (4) chapters. Chapter one (1) has provided a brief overview of the thesis. Chapter two (2) will broadly discuss anti-Black racism in the criminal justice system. It will specifically explore how over-policing and other racially biased policing strategies inexorably leads to the over-imprisonment of Black Canadians. Chapter two (2) will also provide a brief historical discussion of anti-Black racism in Canada. The discussion will highlight the role that Canada played in the slave trade and its treatment of Black Canadians post-slavery. Chapter three (3) will undertake a discussion of sentencing theory, both from a philosophical standpoint and with a focus on the principles enshrined within our current

sentencing regime. It will also provide a case law review of sentencing decisions that have considered race as a mitigating factor in the sentencing. Lastly, chapter four (4) will conduct a critical analysis of the current IRCAR/CIAR movement. It will explore whether sentencing reform can be achieved through the extensive use of IRCARs/CIARs. Moreover, it will offer a prescriptive account of how our awareness of pervasive anti-Black racism ought to be incorporated into our current sentencing regime. It will propose a sentencing framework that promotes proportionate sentencing while attending to how individual responsibility and sentencing fairness should be assessed in light of the cultural legacies and historical oppressions of Black bodies/offenders.

## **Section B: Methodology**

This thesis will utilize a mix-methodological approach by analyzing recent sentencing cases from Nova Scotia and Ontario that considered the race and culture of Black offenders in the formulation of a fit and proportionate sentence. Some of these cases utilized CIARs/IRCARs, while others referred to the seminal cases on Blackness and sentencing, for example, *R v X* in Nova Scotia and *Jackson* in Ontario.<sup>55</sup> These cases will be reviewed to provide a critical doctrinal analysis of the reliance on CIARs/IRCARs within our current sentencing regime. This review will be done through the lens of critical race theory (“CRT”) and against the backdrop of penological theory. This thesis will also incorporate some of the critical scholarship on the policy and scholarly debates about race and sentencing.

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<sup>55</sup>*R v “X”*, *supra* note 41; *Jackson*, *supra* note 42.

The thesis will draw on qualitative research data generated from semi-structured interviews with defence lawyers and Black ex-offenders.<sup>56</sup>The former group consisted of both male and female Black ex-offenders who are currently not entangled in the criminal justice system. The ex-offenders ranged in age from early thirties to late forties.<sup>57</sup>They were mainly Canadian citizens of Jamaican ancestry who were either under-employed or unemployed and did not attend a post-secondary institution. These participants were largely recruited through community contacts, and by word of mouth. I contacted friends and family members that I knew had interactions with the criminal justice system, and sometimes, they provided me with other potential participants.

Each participant was contacted by telephone to discuss availabilities and the scope of the project and their involvement. All of the ex-offender participants were interviewed over the telephone, mainly for convenience, but also because many were located in other cities. The interviews ranged in duration from fifteen (15) minutes to over one and half (1.5) hours. I recorded and digitally stored all the interviews. A prepared script was utilized. However, as the interview unfolded necessary adjustments were made, for example utilizing probing questions and permitting the participants to “go off script” when appropriate or would interfere with their narrative if abruptly redirected. Nine (9) ex-offender participants were interviewed. Table one provides details on these participants’ names, interview dates, age and gender and offence categories.

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<sup>56</sup> All interviews were recorded and digitally stored. I also took hand written notes contemporaneously with the interviews. I did, not, however, transcribe the recordings of the interviews. The Jamaican interviewees’ interview data (which were provided in Jamaican Patois) was translated by me (I am a native Jamaican patois speaker). I have italicized those quotes that I have translated, and those that are direct quotes are marked by quotation marks.

<sup>57</sup> One participant was 63 years old.

**Table 1**

<b><u>Name</u></b>	<b><u>Interview Date</u></b>	<b><u>Age, Gender</u></b>	<b><u>Offence(s)</u></b>
1. S.L	April 2, 2019	30, Female	Drugs and firearm
2. A.W	April 2, 2019	48, Male	Drugs
3. J. M	April 2, 2019	39, Female	Assault
4. M.B	April 4, 2019	35, Male	Drugs
5. M.W	April 3, 2019	38, Male	Mischief
6. O.J	April 3, 2019	43, Male	Drugs
7. C.L	April 4, 2019	63, Male	Assault
8. S.R	April 5, 2019	32, Female	Firearm
9. E.B	April 15, 2019	34, Male	Robbery with Firearm

The second group comprised both male and female members of the criminal defence bar. All of the defence lawyer participants are my colleagues and friends. I emailed each potential participant and explained the scope of the project and their involvement. We would agree on a time and date for the interview, which generally lasted between fifteen (15) minutes and thirty (30) minutes. Most of the interviews were conducted in person, mainly because I worked in close proximity to many of the participants. A few of the interviews were done by telephone. These interviews were recorded and digitally stored. For the interviews conducted in person, I took written notes. Table two below provides details on these participants' names, interview dates, gender and race.

**Table 2**

<b><u>Name</u></b>	<b><u>Interview date/Method</u></b>	<b><u>Gender/Race</u></b>
1. H.D	April 17, 2019 – Telephone	Female/white
2. J.T	April 4, 2019 – Telephone	Female/white
3. D.F	March 28, 2019 – In person	Female/white
4. G.S	March 28, 2019 – In person	Female/Arab
5. S.H	July 30, 2019 – Telephone	Female/Black
6. L.L	March 27, 2019 – Telephone	Female/Black
7. T.L	March 29, 2019 – In person	Male/white
8. A.B	March 28, 2019 – In person	Female/white
9. G.C	March 28, 2019 – Telephone	Male/Black

As mentioned above, some of the interviews were conducted in person, but for convenience, the majority were done over the telephone. The participants were asked similar open-ended questions that aimed to explore the interplay between race, culture and social deprivation/disadvantage and what weight, if any, from the participants' perspective should be accorded to these factors in the sentencing of Black bodies.<sup>58</sup> The study aimed to elicit commentary on how race-based myths operate and are reproduced in the area of criminal justice, particularly in the sentencing arena. The study's findings, which will be discussed in greater detail, revealed unexpected, albeit informative, results about the mobilization of Blackness in the sentencing of Black offenders.

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<sup>58</sup> Please find interview protocols in appendix A.

The interview questions invited the participants to offer their thoughts, broadly, on the criminal justice system and, more specifically, on how it impacts African-Canadians. Admittedly, the questions were constructed to provoke an emotive response.<sup>59</sup> Race talk does that. The questions were designed to create discomfort - not in the sense of traumatizing or instilling fear in the participants - but by problematizing well-settled notions of racial assignments and attributions.<sup>60</sup> The study aimed to elicit an honest and emotive response from the participants that might encourage and contribute to an attitudinal and cultural shift in how we understand Blackness and punishment. For example, consider this classic myth/stereotype: Blacks are overrepresented in prisons because of their inherent desire to commit crimes. The interviewees were asked to share their opinion on the so-called link between Blackness and criminality - a link that many scholars consider to be the product of junk science and borne out anti-Black racism. However, some of the ex-offender interviewees expressed that there may be a link between race and crime. One female ex-offender remarked that *all people engage in crime, but Black people do more shootings and robberies, but they get more blame because of racism*.<sup>61</sup>

Notwithstanding the size of the study<sup>62</sup>, the results provided an informative and rich illustration of the diverging views that defence lawyers and Black offenders have about the introduction of Blackness in sentencing. The participants offered invaluable insights about what considerations should or ought to be accorded to Blackness in the sentencing arena. While the study was too small in scope to generate useable statistical data, the responses it generates serve

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<sup>59</sup> I was granted ethics approval from the York University's Office of research Ethics. Certificate #: STU 2019-022. Approval Period: 03/26/19-03/26/20

<sup>60</sup> See generally Halleh Ghorashi, "When the Boundaries are Blurred: The Significance of Feminist Methods in Research" (2005) 12:3 European Journal of Women's 363; Susanne Bahn & Pamela Weatherill, "Qualitative social research: a risky business when it comes to collecting 'sensitive' data" (2012) 13:1 Qualitative Research 19; Margaret Hunter, "Rethinking Epistemology, Methodology and Racism: Or, Is White Sociology Really Dead?" (2002) 5: 2 Race and Society 119.

<sup>61</sup> S.L. is a 30-year-old Black Canadian female.

<sup>62</sup> I interviewed in total eight (8) defence lawyers and 8 ex-offenders.



to provide texture and specificity to the problem of Black over-incarceration and anti-Black bias in criminal sentencing. Importantly, it may also provide some of the data that scholars currently lack on whether or when it is appropriate to mobilize Blackness at the sentencing phase. This data, particularly the findings from the ex-offender cohort, represents the voice of those people who theoretically stand to benefit from the mobilization of race at sentencing. In analyzing the data, I listened to the recordings and reviewed my notes. I chose quotes that believed were germane to the topics that were under investigation, and that helped to provide context and support for my assertions.

CRT provides the most appropriate theoretical perspective from which to analyze the issues taken up in this thesis. It found its genesis in legal scholarship but has since spread to other disciplines. The theory aims to provide insights on, and “transforming the relationship among race, racism and power.”<sup>63</sup>CRT scholars (“Crits”) posit that racism is deeply entrenched within society and is common and ordinary and therefore presents a significant challenge to cure.<sup>64</sup> Crits challenge the foundations of the liberal order that espouses notions of meritocracy. They reject notions of colour-blind equality that seek to achieve formal equality. According to Crits, society operates in a hierarchical fashion, which they term, white-over-colour ascendancy. This hierarchy serves two functions, namely: psychic and material.<sup>65</sup>This idea is referred to as interest convergence or material determinism. Crits argue that “because racism advances the interests of both white elites (materially) and working-class people (psychically), large segments of society have little incentive to eradicate it.”<sup>66</sup>In a sense, racism serves to undergird white supremacy and promote the interests of white people, notwithstanding their class.

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<sup>63</sup>Richard Delgado & Jean Stefancic, *supra* note 39 at 2.

<sup>64</sup>Richard Delgado & Jean Stefancic, *supra* note 39 at 7.

<sup>65</sup>*Ibid.*

<sup>66</sup>*Ibid.*

Another tenet of CRT is the social construction thesis, which holds that “race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality: rather, races are categories that society invents, manipulates, or retires when convenient”.<sup>67</sup>Races are also subject to differential racialization. This process occurs when “dominant society racializes different minority groups at different times in response to shifting needs.”<sup>68</sup>Differential racialization is closely related to “the notion of intersectionality and anti-essentialism. No person has a simple, easily stated, and unitary identity”.<sup>69</sup>An intersectional approach considers the multiple sites of oppression that frame and informs the Black experience. It considers that anti-Black racism may comprise a convergence of vulnerabilities that cannot be apprehended singularly but must be understood at their intersecting points. In this vein, it rejects essentialist notions of Blackness that seek to reduce or minimize the Black experience as a universal, unitary phenomenon.

A unique feature of CRT is the voice of colour.<sup>70</sup>It rejects notions of neutrality in legal scholarship and advocates for the inclusion of racialized voices in knowledge generation. The voice of colour presupposes that Black scholars have inherent standing to discuss issues related to Blackness on account of their lived experiences. Moreover,

the voice-of-colour thesis holds that because of their different histories and experiences with oppression black, Indian, Asian, and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that the whites are unlikely to know. Minority status, in other words, brings with it a presumed competence to speak about race and racism.<sup>71</sup>

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<sup>67</sup>*Ibid.*

<sup>68</sup>*Ibid* at 8.

<sup>69</sup>*Ibid* at 8-9.

<sup>70</sup> Alex M. Johnson, Jr. “Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship” (1994) 79 Iowa L. Rev. 803.

<sup>71</sup>Richard Delgado & Jean Stefancic, *supra* note 39 at 9.

Frances *et al.* discuss the challenges faced by racialized and indigenous scholars in the Academy.<sup>72</sup> An important issue that may not have been explicitly discussed, but deserves consideration, is that specific knowledge is not being produced by those who have lived the experience. The authors found in their study that racialized scholars are not given the same opportunities as their white counterparts to engage/participate in this knowledge generation economy.<sup>73</sup> Critical race scholarship may provide a platform from which racialized scholars can disrupt the knowledge production enterprise.<sup>74</sup>

As a Black male researcher studying the impacts of anti-Black racial injustice in the criminal justice system, it is critical to acknowledge my own social location, and some of the experiences that animate and ground me. While I do not believe that an exhaustive exposition of my positionalities, identities, and social location, and the role they played in the construction of my research agenda, is warranted. I do, however, agree with critical race scholars that it is vital for “Black and Brown writers to recount their own experiences with racism and the legal system and to apply their own unique perspectives to assess law’s master narratives.”<sup>75</sup> However, the researcher’s positionalities, identities, and social location, if not properly constrained, acknowledged or accounted for may lead to data that reinforces the researcher’s presuppositions about the topic under investigation. The study may also become vulnerable to criticism that it was designed to produce a particular end. Thus, self-reflexivity may have its drawbacks when “researchers who adopt a reflexive approach risk privileging excessive self-analysis and deconstructions at the expense of focusing on the research participants and developing

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<sup>72</sup> Frances Henry, et al, *The Equity Myth: Racialization and Indigeneity at Canadian Universities* (UBC Press, 2017).

<sup>73</sup> *Ibid.*

<sup>74</sup> Richard Delgado & Jean Stefancic, *supra* note 39 at 9.

<sup>75</sup> Richard Delgado & Jean Stefancic, *supra* note 39 at 9.

understanding.”<sup>76</sup>Despite this caution, self-reflexivity and an acknowledgement of one’s social location and positionalities can facilitate the production of, what some scholars describe as “transformative knowledge.”<sup>77</sup>

Like other CRT scholars, I “tell [my] stories of anti-Black racism as a way of healing and performing [my] anti-oppressive practice that prompts action for social justice.”<sup>78</sup>This methodological approach liberates the researcher from the shackles of positivism and objectivity.<sup>79</sup>Indeed, feminist methodology encourages this emancipatory approach to knowledge production by challenging the notion of universalism and the monopolization of the knowledge production process.<sup>80</sup>The performance of the dispassionate researcher should be eschewed and replaced by critical self-reflexivity.<sup>81</sup>Knowledge production, in this sense, becomes a symbiotic enterprise which is critical in generating knowledge that may be used to combat racial injustice. This approach may also shed light on taken for granted assumptions about the population or issue under investigation.<sup>82</sup>It promotes the acknowledgment of power dynamics and ensures that the participant’s agency is not undermined.<sup>83</sup>The extractive process, thus, becomes a joint and equitable exercise - not an exploitative one. Researchers, however, must ensure that they “avoid imposing meaning rather than constructing meaning through negotiation with research

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<sup>76</sup> Karen Lumsden, “‘You Are What You Research’: Researcher Partisanship and the Sociology of the ‘Underdog’ ” (2012) 13:1 Qualitative Research at 4.

<sup>77</sup>Joan M. Anderson, “Toward a Post-Colonial Feminist Methodology in Nursing Research: Exploring the Convergence of Post-Colonial and Black Feminist Scholarship” (2002) 9 (3) Nurse Researcher at 12.

<sup>78</sup>Martha Kuwee Kumsa, Magnus Mfoafo-M’Carthy, Funke Oba & Sadia Gaasim, “The Contours of Anti-Black Racism: Engaging Anti-Oppression from Embodied Spaces” (2014) 1:1 The Journal of Critical Anti-Oppressive Social Inquiry at 24.

<sup>79</sup>Margaret Hunter, *supra* note 57 at 123.

<sup>80</sup> Marjorie L. DeVault, “Talking Back to Sociology: Distinctive Contributions of Feminist Methodology” (1996) 22:1 Annual Review of Sociology 29; Joan M. Anderson, *supra* note 74.

<sup>81</sup> Halleh Ghorashi, *supra* note 57.

<sup>82</sup> Marjorie L. DeVault, *supra* note 77 at 33.

<sup>83</sup> *Ibid.*

participants.”<sup>84</sup>It is within this spirit that I have chosen to introduce my own experiences with criminal justice.

### **Section C: Personal Narrative (Between the Criminal Justice System and Me)**

For most of my teenage and young adult life, I was entangled in the criminal justice system. This reality, however, was a common experience for many of the young Black men in the urban Toronto and Ottawa neighbourhoods, where I spent much of my teenage and young adult life. The normalcy of this legal entanglement also extended to our parents, mainly our poor single Black mothers. It was poor single Black mothers, in support of their young Black sons, that filled the Eglin Street courthouse in Ottawa, 311 Jarvis youth court in Toronto, and various other adult courthouses across the Greater Toronto Area (GTA). My mother was a frequent, albeit reluctant and exasperated supporter of my older brother and me. She had to learn about the obligations of a bail surety and other aspects of the criminal process. Many times, she and other close family members would reluctantly have to disclose embarrassing personal and financial information in order to secure our release. In essence, my entanglement in the criminal justice system inadvertently exposed my family members to criminal justice. Thus, my criminal charge and ultimate punishment became my mother’s charge and punishment.

When I was a young child living in my birth country of Jamaica, my mother and uncle told me that one day, I would become a lawyer - mainly because of my loquacious personality. This prediction was long before any of us knew what a lawyer was or did – except for what we would have viewed on television. My first contact with a ‘real’ lawyer came with my first criminal charge. This was my mother’s first contact with a ‘real’ lawyer, as well. For me, however, contact with the criminal justice system meant street credibility. Over the years, I would be

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<sup>84</sup>Bev Gatenby & Maria Humphries, “Feminist Participatory Action Research: Methodological and ethical issues” (2000) 23:1 Women’s Studies International Forum at 100.

criminally charged several other times and would often retain different lawyers, but one thing remained constant: most of them cared little about my circumstances. I was reminded of this by a criminal defence lawyer that I had retained to act for me on one of my criminal cases. Due to the obvious financial difficulties a person involved in the drug trade would experience following an arrest and charge (heightened police surveillance, etc.), I was unable to pay him the amount we had agreed on. I asked him for some time to pay, and he responded by telling me that “he didn't care if I had to sell a pound of crack to pay his fee.” I never truly trusted any of my lawyers, but there was an understanding that if I paid their fee, I might have a chance of staying out of jail.

However, lawyers were not the only questionable actors that I encountered in the criminal justice system. The police dominated my fears. There was one simple understanding in the streets: police officers hate Black people and vice-versa. That pretty much summed up race relations from the perspective of an over-charged and racially profiled Black man. I never questioned this reality; I just did my best to avoid the police, even in situations when I was doing nothing illegal. I had learned the hard way that wearing black skin was illegal. I was arrested and detained so many times, and for so many different reasons, often spurious, that I lost count. Many of those arrests never amounted to a charge – just a reminder; it would seem that I was being watched.

The above narrative, however, is not an indictment of all criminal lawyers or police officers; instead, it is a description of what many Black men live with every day. I decided to attend law school because I disliked the way lawyers and the police treated members of my community and me. During law school, I was often implored by friends, colleagues and family members to practice criminal law. They assumed that I would make an excellent criminal lawyer because I was once dubbed a criminal. However, I queried if that was what the criminal justice

system required for reform: an influx of reformed Black criminals? Indeed, I have a unique appreciation of the frustration that many young Black men are facing from an unfair criminal justice system. Many of my friends and some of my family members are still caught up in this system, and the police pump new blood, in the form of young Black men, into this system daily. Thus, I would have enough work to keep me busy for a long time. My problem is that I am sometimes morally conflicted about profiting from this onslaught. Call me naive, but I will not directly or indirectly send a young Black man to sell a pound of crack to pay my fees.

## **Chapter Two: Blackness and Criminal Justice**

### **Section A: Anti-Blackness (A Brief Historical Review)**

The institution of criminal sentencing and the broader criminal justice system is a form of structural violence that continues to deprive Black people of their liberty and dignity.<sup>85</sup> At these sites, virulent stereotypes and attitudes about Blackness are reinforced and reified. There is, however, a clear genealogy between these contemporary moments of racial injustice and Black slavery.<sup>86</sup> The Black experience in Canada is a complex and often contradictory mosaic of moments of extreme intolerance – for example, Black slavery<sup>87</sup>, institutional racism<sup>88</sup>, and cultural and socio-economic disintegration – to periods where tolerance is official State policy.<sup>89</sup> The latter, however, tends to form the basis of the contemporary national narrative, which serves to minimize, or in some instances erase Canada’s history and current expressions of virulent anti-Black racism.<sup>90</sup> For example, despite historical and archival evidence that documents Canada’s involvement in the trans-Atlantic slave trade<sup>91</sup>, “the study of slavery is not a significant

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<sup>85</sup> Akwatu Khenti, *supra* note 20 at 190; Akwasi Owusu-Bempah, *supra* note 6; *Paying the Price*, *supra* note 4; *A Collective Impact*, *supra* note 3; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice*, *Supra* note 4.

<sup>86</sup> Afua Cooper, *supra* note 10.

<sup>87</sup> William Renwick Riddell, *Slave in Canada* (Washington: Association for the Study of Negro Life and History, 1920); Frank Mackey, *Done with slavery: the Black fact in Montreal, 1760-1840*, (McGill-Queen's University Press, 2010); Robyn Maynard, *supra* note 12; Ken Donovan, “Female Slaves as Sexual Victims in Île Royale,” (2014) 43:1 *Acadiensis: Journal of the History of the Atlantic Region* 147; Ken Donovan, “Slaves and Their Owners in Ile Royale, 1713-1760” (1995) 25:1 *Acadiensis: Journal of the History of the Atlantic Region* 3.

<sup>88</sup> Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999); Barrington Walker, *supra* note 1; Clayton Mosher, *supra* note 8.

<sup>89</sup> *Charter* at section 27.

<sup>90</sup> Ken Donovan, *supra* note 11 at 110.

<sup>91</sup> Ken Donovan, *ibid*; Catherine M.A. Cottreau-Robins, “Searching for the Enslaved in Nova Scotia’s Loyalist Landscape” (2014) 43:1 *Acadiensis: Journal of the History of the Atlantic Region* 125; Ken Donovan, *supra* note 84; Ken Donovan, *Supra* note 11; “Motion commemorating 200th anniversary of the Abolition of the Slave Trade Act, 1807” (2007) 99:1 *Ontario History*, p. IV. Gale Academic OneFile Select, [http://link.galegroup.com/apps/doc/A166272061/EAIM?u=yorku\\_main&sid=EAIM&xid=f2e367e7](http://link.galegroup.com/apps/doc/A166272061/EAIM?u=yorku_main&sid=EAIM&xid=f2e367e7). Accessed 10 Aug. 2019.



part of the Canadian historical narrative.”<sup>92</sup>The slave historiography has instead been skewed to highlight Canada’s involvement in emancipatory undertakings such as the Underground Railroad and Canada’s granting of asylum to fugitive Black Loyalists during the American Revolutionary War and War of 1812.<sup>93</sup>

As Ken Donovan observes, “the study of slavery in Canada goes against the dominant image of Canada as a land of freedom,” individual rights, multiculturalism and belonging.<sup>94</sup> Consequently, Canada’s slave history is supplanted and obscured by the recent introduction of ‘multiculturalism’ as official state policy.<sup>95</sup> However, while the institution of slavery operated on a smaller scale in Canada, than it did in the other regions of the Black slave world, it nonetheless existed and formed a significant part of Canadian history.<sup>96</sup> Moreover, “slavery in the New World, in addition to being an economic and labour arrangement, was also a racialized system.”<sup>97</sup> Indeed, the social dimensions of Black slavery were not only instrumental in manufacturing the justifications for the practice’s introduction and longevity, but also its legacies. As historian Afua Cooper aptly remarked, “slavery was the context in which current race relations were created.”<sup>98</sup> Slave historian, Kenneth Morgan, also asserted that “the racial prejudice associated with Black slavery has had an enduring impact on modern life.”<sup>99</sup> Slavery produced, reproduced and reinforced a definitional frame that significantly contributed to the pernicious presuppositions

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<sup>92</sup> Ken Donovan, *supra* note 11 at 110.

<sup>93</sup> *Ibid* at 110.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Charter* at section 27.

<sup>96</sup> Ken Donovan, *supra* note 11 at 110; William Renwick Riddell, *supra* note 84; Kenneth Morgan, *A short history of Transatlantic Slavery* (London: I.B. Tauris & CO. Ltd, 2016).

<sup>97</sup> See generally Kenneth Morgan, *ibid*.

<sup>98</sup> Afua Cooper, *supra* note 10.

<sup>99</sup> Kenneth Morgan, *supra* note 93 at 6.

underlying the value of Blackness and Black bodies.<sup>100</sup> It was also instrumental in assigning value to Black bodies – both aesthetic and financial. Black bodies were deemed to be inferior, heathenistic, subhuman, sexually promiscuous, unpleasant, violent, unintelligent, and deprived.<sup>101</sup> These labels were instrumental in constructing the justificatory basis for Black enslavement.<sup>102</sup> These moral, intellectual, physical and psychological deficiencies provided the pretext that undergirded the institution of Black enslavement and its current manifestations/legacies.<sup>103</sup>

### **Section B: Anti-Blackness (Post-Slavery)**

Long gone are the days of slavery, but its contemporary legacies are equally as virulent and destructive to the bodies of Black Canadians. Generations of Black bodies have experienced the sting and indignities of the state's whip - figuratively and literally.<sup>104</sup> The Black body is at once a site of immense historical and contemporaneous State violence and trauma. This violence is given expression through a variety of different, interrelated methods and institutions (i.e. criminal justice, child welfare, policing, education, etc.).<sup>105</sup> The need to control and govern Black bodies stretches back to slavery and has continued to the present day.<sup>106</sup> The abolition of slavery

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<sup>100</sup> See generally Milan Hrabovsky, *supra* note 9; See also Samuel L. Hart, *supra* note 9; Kenneth Morgan, *A short history of Transatlantic Slavery* (London: I.B. Tauris & CO. Ltd, 2016) at 6; Afua Cooper, *supra* note 10; Robyn Maynard, *supra* note 12.

<sup>101</sup> Ken Donovan, *supra* note 11 at 109.

<sup>102</sup> *Ibid.*

<sup>103</sup> Current forms of structural violence leveled against Black Canadians can be traced back to Slavery. Many race scholars who study anti-Black racism begin their analysis of current systems by tracking its trajectory from slavery to the present. For example, some scholars view the current policing crisis in the Black community as a direct result of attitudes and stereotypes about Black bodies that have persisted and continue to label Black bodies. These labelling takes place in many different contexts – i.e. anti-Black racism in criminal justice, child welfare, and education. See for e.g. Robyn Maynard, *supra* note 12.

<sup>104</sup> Constance Backhouse, *supra* note 85; Barrington Walker, *supra* note 1.

<sup>105</sup> Carl James, & Tana Turner, *Towards Race Equity in Education: The Schooling of Black Students in the Greater Toronto Area* (Toronto, Ontario, Canada: York University 2017); David M. Tanovich, “The Colour of Justice: Policing Race in Canada”, *supra* note 4; *One Vision One Voice: Changing the Ontario Child Welfare System to Better Serve African Canadians* (Ontario Association of Children's Aid Societies, 2016) <[http://www.oacas.org/wp-content/uploads/2016/09/One-Vision-One-Voice-Part-1\\_digital\\_english.pdf](http://www.oacas.org/wp-content/uploads/2016/09/One-Vision-One-Voice-Part-1_digital_english.pdf)>; A *Collective Impact*, *supra* note 3.

<sup>106</sup> Robyn Maynard, *supra* note 12.

in the British colonies, including Canada, was only the end of institutional chattel slavery, which was replaced by even more invidious forms of white supremacy.<sup>107</sup> The period between slavery and the modern Black experience is marked by moments of extraordinary structural violence, some that were legislated and others that persisted through the attitudes of white Canadians about Blackness.<sup>108</sup> Constance Backhouse found in her study that the *Ku Klux Klan*, a white supremacist group that was initially formed in the United States, took root in communities across parts of southern Ontario and disseminated their hate-filled message about race-mixing - an attitude that was shared in large part by many Canadians.<sup>109</sup> Studies also found that around that time, anti-Blackness suffused the entire criminal justice system.<sup>110</sup> Over time, the methods of control have included slave patrols<sup>111</sup>, weaponized rape<sup>112</sup>, anti-miscegenation policies<sup>113</sup>, segregation<sup>114</sup>, intimidation<sup>115</sup>, restrictive immigration policies<sup>116</sup>, and other destructive and insidious measures of denying Black peoples full citizenship and inclusion within Canadian society.

Both Michelle Alexander, writing in the American context, and Robyn Maynard writing in the Canadian context, agree that post-slavery, the over-criminalization of Black Canadians became a conspicuous method of controlling Black bodies.<sup>117</sup> In terms of punishment, Mosher argues that the institution of criminal sentencing was a method that was used following slavery

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<sup>107</sup> Constance Backhouse, *supra* note 85; Barrington Walker, *supra* note 1.

<sup>108</sup> See generally Clayton Mosher, *supra* note 8.

<sup>109</sup> Constance Backhouse, *supra* note 85 at 182; See also Clayton Mosher, *supra* note 8 at 643.

<sup>110</sup> Barrington Walker, *supra* note 1; Clayton Mosher, *ibid*.

<sup>111</sup> Robyn Maynard, *supra* note 12.

<sup>112</sup> Ken Donovan, *supra* note 84.

<sup>113</sup> Clayton Mosher, *supra* note 8 at 641-643.

<sup>114</sup> Constance Backhouse, *supra* note 85 at 17 and 250-252.

<sup>115</sup> *Ibid* at 187.

<sup>116</sup> Clayton Mosher, *supra* note 8 at 641.

<sup>117</sup> Michelle Alexander, *supra* note 50; Robyn Maynard, *supra* note 12.

to control the Black threat to white Canada.<sup>118</sup>For example, the study found that in Ontario between 1892-1961, anti-Black stereotypes and attitudes were instrumental in sentencing outcomes.<sup>119</sup>In fact, during that period, Black Canadians were disproportionately incarcerated and subjected to harsher punishment compared to their white counterparts.<sup>120</sup>The disparity in sentencing was mainly premised on prevailing notions of Black people's propensity for criminality and the need to control the purported threat that they posed to the social integrity of Canada.<sup>121</sup>There is no recent evidence to suggest that current sentencing disparities are a reaction to the same threat. However, and as will be discussed below in more detail, the association of Blackness with criminality continues to increase the already disproportionate levels at which African Canadians are arrested, prosecuted and imprisoned compared to their similarly situated white counterparts.<sup>122</sup>

### **Section C: Anti-Black Racism, and Blackness (Some Definitional Musings)**

Scholars assert that “the term anti-Black racism is intriguing. Its meaning is multi-layered and configured differently, it could mean several things”.<sup>123</sup>Indeed, even Blackness, a concept that is used extensively in this thesis, is “hotly contested.”<sup>124</sup>There is no monolithic notion of Blackness, nor does there exist a prototypical Black person that embodies all the traits and idiosyncrasies of all Black Canadians. There is an inherent danger in packaging Blackness as a singular experience. It is, however, challenging to delineate the epistemological, axiological and ontological contours of Blackness and anti-Black racism. The immediate goal of this thesis is not

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<sup>118</sup>Clayton Mosher, *supra* note 8.

<sup>119</sup>*Ibid.*

<sup>120</sup>*Ibid.*

<sup>121</sup>*Ibid.*

<sup>122</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4; *A Collective Impact*, *supra* note 3; Shelley Trevethan and Christopher J. Rastin, *supra* note 8.

<sup>123</sup> Martha Kuwee Kumsa et al, *supra* note 75 at 21.

<sup>124</sup> *Ibid* at 25.

to engage in a debate about semantics and definitions but rather to discuss the impacts of structural violence that are a consequence of anti-Black racism. The practical realities of this form of structural violence are hard to deny. As Stephen Lewis aptly stated in his report:

it is Blacks who are being shot, it is Black youth that is unemployed in excessive numbers, it is Black students who are being inappropriately streamed in schools, it is Black kids who are disproportionately dropping out, it is housing communities with large concentrations of Black residents where the sense of vulnerability and disadvantage is most acute, it is Black employees, professional and non-professional, on whom the doors of upward equity slam shut. Just as the soothing balm of ‘multiculturalism’ cannot mask racism, so racism cannot mask its primary target.<sup>125</sup>

For our purposes, anti-Black racism is best understood as a convergence of multiple sources of oppression that finds its genesis in Black slavery. It is crucial to reject a unitary understanding of Blackness. CRT scholars, most notably Kimberle Crenshaw, instead adopt an intersectional framework that analyzes how multiple sources of oppression can “intersect” to create an axis of vulnerability that is more than just the sum of its parts. Hence, it is not enough for us to sequentially analyze each locus of oppression; rather, the intersection must be apprehended on its own terms.<sup>126</sup> Thus, being a socially constructed concept, Blackness is experienced, understood, created and manipulated in various ways.<sup>127</sup> Blackness is a multi-dimensional and complex idea that is not easily understood. It exists and is given meaning at various intersections of social life. Blackness in post-slave societies may be understood differently than Blackness in societies that did not experience the trans-Atlantic slave trade. There is also an important distinction between Blackness, as it is experienced in white-dominated societies, compared to how it is experienced

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<sup>125</sup> Stephen Lewis, “Report on Race Relations in Ontario” (Toronto: Queen’s Printer, 1992).

<sup>126</sup> Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) U of Chicago Leg Forum 139; *Feminism, Law, Inclusion. Intersectionality in Action*, ed by Gayle Macdonald, Rachel L. Osborne and Charles C. Smith (Toronto: Sumach Press, 2005); Athena D.

Mutua, “The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship” (2006) 84 Denv. U. L. Rev. 329 at 372; Carol A. Aylward, “Intersectionality: Crossing the Theoretical and Praxis Divide” (2010) *Journal of Critical Race Inquiry* 1:1; Richard Delgado & Jean Stefancic, *supra* note 39.

<sup>127</sup> Richard Delgado & Jean Stefancic, *supra* note 39 at 7.

in predominately Black societies. When asked if there is an inherent linkage between crime and Blackness, one ex-offender remarked that *there is nothing good about Black in the eyes of white people*.<sup>128</sup> In this sense, Blackness is understood as imposing a burden and not as a source of pride, which is contrary to my own experiences of Blackness in my birth country of Jamaica.

Jamaica is a post-slavery country that is mainly populated by the descendants of Black African slaves. In Jamaica, we were taught to be proud of our Blackness and enculturated to appreciate the sacrifices and triumphs of our ancestors who resisted white subjugation. This culture of resistance is the hallmark of ‘Jamaicanness’ and in turn, informs my understanding of Blackness. My understanding of Blackness shifted when I immigrated to Canada. In Canada, I was primarily introduced to topics that highlighted Black inferiority, both historically and contemporaneously. I was taught that my descendants were slaves that lived in abject servitude until finally being emancipated through the benevolence of white legislators. The misery did not stop with the abolition of slavery. I was taught that post-slavery Black Canadians were denied all the rights of full citizenship and relegated to the margins of society. Indeed, notions of Blackness in Canada were in contradistinction to my experience of Blackness in Jamaica. William Oliver describes this phenomenon as cultural racism. He argues that:

a significant example of cultural racism as a social and institutional practice and an example of structural violence involves the conspicuous absence in most elementary and high school social studies curricula of a substantive discussion of the contributions of Africans and African Americans to the development of human civilization (Ben-Jochannan, 1991). Given the importance of history and social studies as a means by which a society introduces its young people to its celebration story, the conspicuous absence of African Americans in history textbooks reinforces and promotes racist ideology and racial stereotypes.<sup>129</sup>

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<sup>128</sup> A.W. is a 48-year-old Black male. This statement was given originally in Jamaican patois. It succinctly captures the attitudes of most of the ex-offender interviewees about their understanding of Blackness and crime.

<sup>129</sup> William Oliver, “Cultural Racism and Structural Violence: Implications for African Americans” (2001) 4:2/3, *Journal of Human Behavior in the Social Environment* at 5.

Indeed, anti-Black racism has ravaged Black communities in post-slavery countries where Black people are a racial minority, like Canada. While the term Blackness is being used as a catch-all for the commonalities that link the diverse experiences of Black Canadians - those commonalities are informed by Canada's legacy as a participant in slavery, which resulted in the current sophisticated structural and systemic abuse in many areas of social life. Today, Black Canadians experience exclusion, discrimination and oppression –largely in the form of anti-Black racism and its intersected realities violence, socio-economic status, personal beliefs, etc. This reconstituted prejudice is brought into sharp relief in the administration of the criminal justice system.

#### **Section D: Anti-Black Racism and Criminal Justice**

Anti-Black racism not only informs but is an accurate predictor of how Black Canadians will interface with the criminal justice system. There is a clear genealogy from the most explicit and violent forms of anti-Black racism to current expressions of structural violence against Black Canadians. Black Canadians still experience significant disadvantage and structurally inflicted violence, but in terms that have been sanitized and taken out of public view. This new subtler form of anti-Black racism is more difficult to combat insofar as it is now an indistinguishable feature of society's institutions, such as the criminal justice system.<sup>130</sup> However, despite the subtleness of current expressions of anti-Black racism, there exists an intractable relationship between Blackness and crime that continues to inform current understandings of Black criminality. Scholars who study race and crime generally agree that our system of criminal

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<sup>130</sup> Richard Delgado & Jean Stefancic, *supra* note 39.

justice is inherently biased and hostile towards racialized people.<sup>131</sup> Indeed, this bias has suffused the entire criminal justice system and leads to the over-incarceration and criminalization of Black Canadians. CRT scholars assert that, “in legal discourse, preconceptions and myths, for example about black criminality, shape mindset-the bundle of received wisdoms, stock stories, and suppositions that allocate suspicion, place the burden of proof on one party or the other, and tell is in cases of divided evidence what probably happened”.<sup>132</sup>

Racial stereotypes concerning African Canadian criminality, including the belief that African Canadians are associated with drug trafficking and gun crimes, have resulted in the overcharging of Black men in those charge categories.<sup>133</sup> These beliefs create a self-fulfilling prophecy regarding Black men’s purported proclivity for committing violent offences.<sup>134</sup> As Tanovich aptly asserts: “so long as the police see the face of street level crime as Black, it will always remain so.”<sup>135</sup> Admittedly, there is a problem with violence in some Black communities, which is mostly due to socioeconomic factors. However, if Black people are more likely to engage in criminality, it may be a symptom of racist structural disadvantage.<sup>136</sup> As Paul Butler explained, albeit in the American context, but which is nonetheless applicable in the Canadian context:

criminal conduct among African Americans is often a predictable reaction to oppression. Sometimes black crime is a symptom of internalized white supremacy; other times it is a reasonable response to the racial and economic subordination every African-American

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<sup>131</sup> David M. Tanovich, “The Colour of Justice: Policing Race in Canada”, *supra* note 4; David M. Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System”, *supra* note 5; Akwatu Khenti, *supra* note 20 at 190.

<sup>132</sup> Richard Delgado & Jean Stefancic, *supra* note 39 at 43.

<sup>133</sup> *A Collective Impact*, *supra* note 3; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4; *Paying the Price*, *supra* note 4.

<sup>134</sup> David M Tanovich, “E-Racing Racial Profiling” (2004) 41:4 Alberta L Rev at 916.

<sup>135</sup> *Ibid.*

<sup>136</sup> Paul Butler, *supra* note 50 at 680.



faces every day. Punishing black people for the fruits of racism is wrong if that punishment is premised on the idea that it is the black criminal's "just deserts."<sup>137</sup>

Indeed, some of the ex-offenders interviewed for this project expressed that Black men are more likely to be involved in gun and drug crimes. When asked to explain this assertion, one interviewee stated that *having a gun is necessary to survive and to get food*.<sup>138</sup> He furthermore explained that *the court should take that into consideration when sentencing the person*.<sup>139</sup>

There exist a gun and drug problem in some communities across Canada, particularly Toronto, a fact that was emphasized by most of the ex-offender interviewees.<sup>140</sup> For many years, this problem has undergirded the deployment of police resources in primarily Black communities.<sup>141</sup> This issue has also been exploited by police to increase their use of racially motivated investigative methods, i.e. carding.<sup>142</sup> Criminologists and legal scholars agree that biased policing is one of the primary conduits through which Black bodies are transported into the criminal justice system.<sup>143</sup> There is a general consensus among scholars, which has been consistently supported by ample empirical evidence that this systemic injustice is a product of anti-Black racism.<sup>144</sup> The iconography and accompanying narrative of the 'dangerous Black man' is central in the decision-making around who, and how frequently, police officers, investigates,

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<sup>137</sup> Paul Butler, *ibid*; See also Tommie Shelby, "Justice, Deviance, and the Dark Ghetto" (2007) 35:2 Philosophy & Public Affairs 126; See also Raff Donelson, "Blacks, Cops, and the State of Nature" (2017) 15:1 Ohio State J of Crim L 183.

<sup>138</sup> O.J. is 43-year-old Black man. This statement was given in Jamaican patois and translated by me. The reference 'to get food' is Jamaican for acquiring the economic necessities to for basic survival.

<sup>139</sup> O.J. is 43-year-old Black man. This statement was given in Jamaican patois and translated by me.

<sup>140</sup> The ex-offenders all agreed that there is serious gun problem in Toronto; *Firearm-related violent crime, 2009-2017*: Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey, <<https://www150.statcan.gc.ca/n1/en/pub/89-28-0001/2018001/article/00004-eng.pdf?st=OY1aKAEI>>

<sup>141</sup> Akwatu Khenti, *supra* note 20 at 190; David M. Tanovich, *supra* note 20.

<sup>142</sup> Scot Wortley, "A Double-Edged Sword: Carding, Public Safety, and the Impact of Racialized Police Practices" in Lorne Foster, Lesley Jacobs, Bobby Sui & Shaheen Azmi, *Racial Profiling and Human Rights in Canada: The New Legal Landscape* (Toronto: Irwin Law, 2018) 257; See also *Report of the Independent Street Checks Review* (Toronto: Queen's Printer for Ontario, 2018).

<sup>143</sup> See generally Scot Wortley & Julian Tanner, "Data, Denials, and Confusion: The Racial Profiling Debate in Toronto" (2003) 45 Can. J. of Crimin. & Crim. Jus. 367; See David M. Tanovich, "The Colour of Justice: Policing Race in Canada", *supra* note 4.

<sup>144</sup> David M. Tanovich, *supra* note 131.

arrests, and charges.<sup>145</sup> It may also guide crown prosecutors about what cases to proceed with, and ultimately guide judges in their sentencing of Black offenders.<sup>146</sup> The resulting influx of Black offenders before the criminal courts, and in prisons simultaneously produces and reproduces the notion and narrative of the recalcitrant and dangerous Black man. Thus, anti-Black racism within the criminal justice system, particularly in the policing context, not only targets Black ‘offenders’ but is also instrumental in their creation.<sup>147</sup> This narrative, in some cases, travels with the offender from his initial arrest to the sentencing, which can result in disproportionate sentences for Black offenders.<sup>148</sup> For instance, recent studies by the Office of the Correctional Investigator (“OCI”) have recorded that Black Canadians are over-represented in the Federal prison population. The OCI found in 2015-2016 and 2016-2017 that while Blacks represented only 3% of Canada’s population, they make up 8.6% of all those federally incarcerated.<sup>149</sup> This apparent over-representation was also recorded in Ontario.<sup>150</sup> In one study it was found that “Black offenders were most likely to be incarcerated in Ontario.”<sup>151</sup> In *Jackson*, Justice Nakatsuru commented that “stripped to its essentials, African Canadians have been jailed three times more than their general representation in society for quite some time. The problem is not getting better”.<sup>152</sup>

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<sup>145</sup> David M. Tanovich, *ibid*; *A Collective Impact*, *supra* note 3; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4; *Report of the Independent Street Checks Review*, *supra* note 139.

<sup>146</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4.

<sup>147</sup> David M. Tanovich, *supra* note 131.

<sup>148</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4 at chapter 8.

<sup>149</sup> *Annual Report of the Office of the Correctional Investigator 2015-2016* (Ottawa: 2016) < <https://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20152016-eng.pdf>>; *Annual Report of the Office of the Correctional Investigator 2016-2017* (Ottawa: 2017) < <https://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20162017-eng.pdf>>

<sup>150</sup> Shelley Trevethan and Christopher J. Rastin, *supra* note 8.

<sup>151</sup> *Ibid*.

<sup>152</sup> *Supra* note 41 at 40.

There is also cogent evidence to suggest that Blackness is a central consideration in the public's perception of sentence appropriateness.<sup>153</sup> This public perception has existed across space and time. Studies have found that in Ontario during the late 19<sup>th</sup> century to the middle of the 20<sup>th</sup> century, anti-Black stereotypes and attitudes were instrumental in sentencing outcomes.<sup>154</sup> These studies show that the over-incarceration of Black bodies is not a new phenomenon. However, in earlier times, sentencing disparities were more acute, and the reasons for the unfairness were generally explicitly stated.<sup>155</sup> For instance, some sentencing magistrates relied on stereotypical narratives and attitudes about Black Canadians in their sentencing of Black offenders. As Clayton Mosher argues:

in such a climate of perceived threat, we would expect that black violent offenders would be treated more severely by the criminal courts, especially when they victimized Whites, and particularly in jurisdictions and in historical periods in which the numbers of Blacks posed a greater numerical threat to white Canadian society.<sup>156</sup>

Barrington Walker similarly argues “that when Blacks appeared before the criminal courts, ‘race,’ whether tacitly or overtly, procedurally or rhetorically, was on trial.”<sup>157</sup> During the periods under investigation, both Mosher and Walker found that the hysteria about Black dangerousness and volatility was an integral factor in sentencing determinations.<sup>158</sup> Race played a prominent role in sentencing, albeit for pernicious purposes. The offender's Blackness was seen as an aggravating factor, particularly if the crime involved a white victim, and served as a justification for his harsh treatment.<sup>159</sup> Moreover, even in cases where a white offender was convicted of a

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<sup>153</sup> Anne-Marie Singh & Jane B. Sprott, *supra* note 8.

<sup>154</sup> Clayton Mosher, *supra* note 8; Barrington Walker, *supra* note 1.

<sup>155</sup> Clayton Mosher, *ibid*; Barrington Walker, *supra* note 1.

<sup>156</sup> Clayton Mosher, *ibid* at 644-645.

<sup>157</sup> Barrington Walker, *supra* note 1 at 20.

<sup>158</sup> Barrington Walker, *ibid*; Clayton Mosher, *supra* note 8.

<sup>159</sup> Barrington Walker, *ibid*; Clayton Mosher, *ibid* at 654; The term aggravating is not used in the same sense as it used under the s.718 sentencing framework.

similar offence, the Black offender would receive a harsher punishment.<sup>160</sup> According to Mosher, this disparity in punishment was a reaction to the so-called threat that Black bodies posed to Canadian society.<sup>161</sup>

Historically “the criminal law was an integral part of how race was produced, managed, and expressed in the racial liberal order that framed the Black experience in Canada.”<sup>162</sup> Black bodies, however, continue to be coded as dangerous and posing a threat to public safety. There are no contemporary sentencing decisions that have overtly relied on the so-called causal link between Blackness and propensity for crime to justify excessive sentences. This transformation in sentencing decision-making may only represent a change in language but not attitudes, and indeed, it has had limited impact on sentencing outcomes of Black Canadians. Scholars who study the over-incarceration of racialized people have consistently reported that Black people are over-represented in prisons.<sup>163</sup> The cause of this disparity is multi-dimensional and complex. The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System found that “racialized judgments and assumptions may also contribute to differential sentencing. They may directly influence the decisions of sentencing judges or may be transmitted from decisions made at earlier stages of the criminal justice process”.<sup>164</sup>

It would be untenable for even the staunchest supporter of our criminal justice system to deny the fact that anti-Black racism infects the criminal justice system. As earlier as 1993, in the case of *R v Parks*, Doherty JA. held that:

racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment

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<sup>160</sup> Clayton Mosher, *ibid.*

<sup>161</sup> See generally Clayton Mosher, *ibid.*

<sup>162</sup> Barrington Walker, *supra* note 1 at 20.

<sup>163</sup> Julia Sudbury, *supra* note 8; Jamil Malakieh, *Supra* note 14; Shelley Trevethan and Christopher J. Rastin, *supra* note 8.

<sup>164</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4 at 7.

subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.<sup>165</sup>

Stephen Lewis' 1992 report on Race Relations in Ontario signalled, at the time, that anti-Black racism was the most pervasive form of racism in Ontario.<sup>166</sup> In 1995 the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System provided even more incontrovertible evidence to support the fact that anti-Black racism was prevalent within the criminal justice system.<sup>167</sup> Today hardly any judge, academician, or lawyer would question the existence of anti-Black racism in the criminal justice system. However, while its existence is not in dispute, nor is it as blatant as in previous eras, the impacts on Black communities nonetheless remain the same.

### **Section E: Anti-Black Policing**

There is a direct and ongoing link between over-incarceration and Black overrepresentation in the criminal justice system. Today, the over-criminalization of Black people is primarily done through biased policing.<sup>168</sup> It is generally accepted that one of the most insidious current practices of anti-Black racism is the race-based profiling of African-Canadians.<sup>169</sup> Racially biased policing is a method of racialization in that it is used to construct the usual offender typology.<sup>170</sup> In *R v Richards*, quoting from the Intervener African Canadian Legal Clinic's factum, racial profiling is defined as:

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<sup>165</sup> *R v Parks*, *supra* note 43 at 369.

<sup>166</sup> Stephen Lewis, *supra* note 122.

<sup>167</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4.

<sup>168</sup> *A Collective Impact*, *supra* note 3; David M. Tanovich, "The Colour of Justice: Policing Race in Canada", *supra* note 4.

<sup>169</sup> David M. Tanovich, "Applying the Racial Profiling Correspondence Test" in *Lorne Foster, Lesley Jacobs, Bobby Sui & Shaheen Azmi, Racial Profiling and Human Rights in Canada: The New Legal Landscape* (Toronto: Irwin Law, 2018) 83; *A Collective Impact*, *supra* note 3; David M. Tanovich, "The Colour of Justice: Policing Race in Canada", *supra* note 4.

<sup>170</sup> David M. Tanovich, *supra* note 131.

criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.<sup>171</sup>

The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System found that:

racialized characteristics, especially those of black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex (male), youth, make and condition of car (if any), location, dress, and perceived lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped on foot or in cars. This explanation is consistent with our findings that, overall, black people are more likely than others to experience the unwelcome intrusion of being stopped by the police, but black people are not equally vulnerable to such stops.<sup>172</sup>

Racial profiling generally occurs when police, customs officers and crown prosecutors use race as a marker of distinction in the exercise of their statutory discretion.<sup>173</sup> Beyond the disadvantage, vulnerability, and stereotyping experienced by African Canadians in the wider society, African Canadians encounter racial discrimination, specifically in the context of policing. The disadvantage of African Canadians by the police is perpetuated and reinforced by virulent and pervasive anti-Black stereotypes. Black communities are generally classified as high-risk, but as Tanovich argues:

designation [as a] ‘high crime area’ is not so much an accurate reflection that more crime occurs in the area as compared to other areas in the city, but rather, that the area is over-policed. Moreover, as a matter of policy, treating the place of the stop as a relevant

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<sup>171</sup> *R v Richards*, 1997 CanLII 3364, 100 OAC 215 (ON CA) at 24.

<sup>172</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4.

<sup>173</sup> See especially Sunil Gurmukh, “Interrogating the Definition of Racial Profiling: A Critical Legal Analysis” in in Lorne Foster, Lesley Jacobs, Bobby Sui & Shaheen Azmi, *Racial Profiling and Human Rights in Canada: The New Legal Landscape* (Toronto: Irwin Law, 2018) 59. Gurmukh provides different examples of racial profiling outside of policing and criminal justice. Police officers are not the only state agents that participate in racial profiling. There is ample evidence that crown prosecutors and customs officers are actively engaged in this evil. The social science evidence is overwhelming in evincing the strong presence of racial profiling in police, prosecutorial and customs practices. For example, black passengers returning from Jamaica are more likely to be searched and undergo secondary inspection as compared to white passengers. Black accused are also generally over-charged and prosecuted for certain crimes compared to their white counterparts. See eg. *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4; *Paying the Price*, *supra* note 4.

consideration in the reasonable suspicion calculus unduly prejudices low-income and minority residents.<sup>174</sup>

There is no reliable scientific evidence that Blacks are more prone to criminality than their non-Black counterparts. Nevertheless, Black men are generally deemed presumptively dangerous; and are thereby more likely to be arrested, detained, charged, assaulted and killed by police in comparison to their white counterparts.<sup>175</sup> The fusion of Blackness and criminality arguably undergirds police practices, scrutiny and allocation of resources. Some scholars have even asserted that racial profiling is law enforcement tool, albeit an unreliable one.<sup>176</sup> Through the vehicle of racial profiling, Black bodies are ‘othered’ and made the subject of unwanted and extreme scrutiny. Despite Black Canadians’ putative membership in Canadian society, there exists an almost impassable gulf between him and his non-racialized counterparts. He walks among them, but he is not one of them.

Othering operates as a justification for the different forms of police interaction experienced by Black Canadians in comparison to their non-Black counterparts.<sup>177</sup> The stereotypical Black suspect is a central consideration in so-called proactive policing.<sup>178</sup> For example, the creation of a suspect profile may operate as an early method of detecting crime. Given prevalent stereotypes about Black Canadians’ so-called volatility and dangerousness, they are usually defined as the archetypal suspect.<sup>179</sup> For this reason, *inter alia*, it may be argued that Black Canadians exist in a perpetual state of criminal liability. It is becoming increasingly irrefutable, that Black lives are under constant assault by police. Therefore, the unfair

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<sup>174</sup> David M. Tanovich, “Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40:2 Osgoode Hall L J at 91 (LexisNexis).

<sup>175</sup> *A Collective Impact*, *supra* note 3.

<sup>176</sup> David M. Tanovich, *supra* note 131 at 933.

<sup>177</sup> David M. Tanovich, *ibid* at 916; *A Collective Impact*, *supra* note 3.

<sup>178</sup> David M. Tanovich, *ibid*.

<sup>179</sup> *Ibid*.

presumption of Black dangerousness should be redirected to the police, because it is manifestly clear that Black Canadians face more danger from those who have sworn to protect their lives. The prevalence and salience of race-based police discrimination contribute to and entrenches the general mistrust and ambivalence expressed by Black Canadians towards the criminal justice system. In *Le*, which will be discussed in more detail below, the Court accepted that practices such as carding and racial profiling “contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization.”<sup>180</sup>

There are procedural mechanisms entrenched within the *Charter* that may be used to eradicate or at least address biased policing. However, there has been a conspicuous erasure of race in the Court’s *Charter* jurisprudence, particularly in the Court’s jurisprudence on policing.<sup>181</sup> Despite judicial and scholarly recognition of this phenomenon and its damaging impacts on Black bodies and communities, the Court has only ever marginally engaged in a race-based analysis of the *Charter* rights that are engaged by police encounters.<sup>182</sup> Tanovich argues that since its inception, the *Charter* has had minimal impact on racial injustice in Canada. Racial justice he asserts “has not had a chance to grow because of trial and appellate lawyers’ failure to engage in race talk in the courts and a failure of the judiciary to adopt appropriate critical race standards when invited to do so.”<sup>183</sup>

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<sup>180</sup> *Le*, *supra* note 5 at 95.

<sup>181</sup> David M. Tanovich, *supra* note 171; David M Tanovich, “The *Charter* of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System”, *supra* note 5.

<sup>182</sup> *R v Grant* 2009 SCC 32 [*Grant*]; *R v Golden* 2001 SCC 83 [*Golden*]. In *Le*, the Court may have potentially lifted the judicial embargo on the discussion of race and biased policing; and, in so doing made a significant, and much needed, contribution to critical race Charter litigation. The precedential impact of *Le* is challenging to predict, but there is reason to hope that *Le* will provide a veritable roadmap for lawyers who are seeking to mobilize race in the detention analysis under section 9 of the *Charter*.

<sup>183</sup> David M Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System”, *supra* note 5.



## **Section F: Do Black Lives Even Matter?**

The criminal justice system has shaped current narratives about Black people and in so doing, provided the ontological foundations for the denial of Black innocence and humanity. Many of the ex-offenders interviewed for this project agreed that Blackness and innocence are mutually exclusive concepts. One interviewee even remarked that *even though I can't see inside the judge's mind, I believe that Blacks are sentenced harsher because of our colour*.<sup>184</sup> A.W.'s comment seems to suggest that, albeit in his own mind, that his mere physical presence provided the rationale for harsh treatment. What does this statement reveal about how Black Canadians perceive their bodies? It has been suggested by one commentator that “the black body is not viewed as being capable of making the progression from the bodily identity to consciousness and morality that Locke feels is necessary for the governance of, and participation in, civil society.”<sup>185</sup> In some sense, degradation has been inscribed on the bodies and psyches of Black people. A degraded body is ripe for destruction. Criminal punishment is a salient method through which Black bodies are degraded, and ultimately destroyed. James Q. Whitman, argues that “we all know intuitively that degradation, in this sense, often plays a significant role in punishment: part of what makes punishments effective is their power to degrade—their power to make the person punished feel diminished, lessened, lowered.”<sup>186</sup>

There exist in Canada, and perhaps more recognizable in the United States, a relationship between Black bodies and punishment.<sup>187</sup> Anti-Blackness strips Black bodies of the ability to express or sense remorse, embody innocence or be worthy of mercy. In other words, Black

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<sup>184</sup> A.W. is 48-year-old Black, Jamaican-Canadian man. His comments were provided in Jamaican patois and translated by me.

<sup>185</sup> Camisha Sibblis, *supra* note 3 at 68.

<sup>186</sup> James Q. Whitman, *Harsh justice: criminal punishment and the widening divide between America and Europe* (New York: Oxford University Press, 2005) at 8.

<sup>187</sup> See generally Michelle Alexander, *supra* note 50; Robyn Maynard, *supra* note 12.

bodies exist in a state of moral blameworthiness and guilt; and is thus always worthy of, and available for punishment. Degradation does not only occur as a result of criminal punishment; rather, it permeates the lives of Black Canadians and reduces the value of Blackness. This systematic devaluation results in social death and a certain “nothingness.”<sup>188</sup>To put another way, Black lives do not matter. Calvin L. Warren explains that the question of whether Black lives matter, “reemerges within a world of antiblack brutality, a world in which black torture, dismemberment, fatality, and fracturing are routinized and ritualized — a global, sadistic pleasure principle.”<sup>189</sup>

To understand anti-Blackness, it is crucial to not only focus on its intellectual dimensions, but also its aesthetic contours. As Sherene Razack explains, “race is crucial to pre-emptive punishment” as “risk is read on the body.”<sup>190</sup>Razack makes this claim in the context of the war on terror and its relationship with Muslim bodies. Her basic premise, however, applies to what can only be characterized as a war on Blackness. Any discourse of risk is inherently race-d as we pre-emptively read risk on certain bodies. Black bodies are inscribed with notions of risk, lethality, and danger, and in some sense, have become weaponized.<sup>191</sup>These inscriptions support the presupposition that Black bodies are to be approached with caution and in some cases, met with pre-emptive violence. Moreover, anti-Blackness can be characterized as constructing an Agambenian ‘state of exception’, wherein the very existence Black bodies creates a permanent

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<sup>188</sup> Calvin L. Warren, *Ontological Terror: Blackness, Nihilism, and Emancipation* (Duke University Press, 2018); Lisa Marie Cacho, *Social death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York University Press, 2012).

<sup>189</sup> Calvin L. Warren, *ibid* at 2.

<sup>190</sup> Sherene Razack, *Casting out*, *supra* note 3 at 31.

<sup>191</sup> Wesley Crichtlow, “Weaponization and Prisonization of Toronto’s Black Male Youth” (2014) 8 Caribbean review of gender studies 235.

state of emergency.<sup>192</sup> In international public law scholarship, most notably works on the war on terror, in times of emergency, the sovereign is justified in exempting itself from the established legal order.<sup>193</sup> The state of exception doctrine “can be best described as a move from defence to prevention or as a move from deterrence to risk management.”<sup>194</sup> However, Scheuerman argues that “rulers exploit crisis situations to augment their personal and institutional power, relying on emergencies to transform the existing legal framework.”<sup>195</sup>

The Black crisis/emergency (“the war on Blackness”) is not a Black creation; instead, it is the consequence of an evolution of hate that has been mobilized and manipulated to keep peoples of African descent subjugated and oppressed. The need to dominate and punish Black bodies has continued unabated since slavery. This intergenerational and systemic oppression of Black peoples has created a deeply entrenched sense of vigilance and fear within the collective Black psyche. Critical Black psychologists, social workers, and trauma workers have characterized this experience as post-traumatic slavery disorder.<sup>196</sup> Research into this trauma is reshaping and revolutionizing our understanding of Black trauma and its various manifestations. At the core of this scholarship “is to call attention to an array of attitudes, habits and behaviours which clearly follow a direct lineage to slavery.”<sup>197</sup> While slavery is no longer a physical reality for Black Canadians, its lingering effects are viscerally felt through the over-criminalization of the Black body.<sup>198</sup> Indeed, punishment continues to define the relationship between the state and

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<sup>192</sup> Giorgio Agamben, “The State of Exception as a Paradigm for Government” in *State of Exception* (Chicago: University of Chicago Press, 2005) at 1.

<sup>193</sup> William E. Scheuerman, “Emergency powers” (2006) 2 *Annual Review of Law and Social Science* at 259.

<sup>194</sup> Rens V. Munster, “The War On Terrorism: When The Exception Becomes The Rule” (2004) 17 *International Journal for the Semiotics of Law* at 142.

<sup>195</sup> William E. Scheuerman, *supra* note 190 at 259

<sup>196</sup> Sekou Mims, Larry Higginbottom & Omar Reid, “Behaviour Definition for Post Trauma and the African Experience: Post Traumatic Slavery Disorder”, Online: (2001) Pyramid Builders, Inc./Osiris Group vol.1 at para 2 <<http://osirisinstitute.com>>

<sup>197</sup> *Ibid* at 11.

<sup>198</sup> Michelle Alexander, *supra* note 50; Robyn Maynard, *supra* note 12.

African Canadians. This statement is not born out of racial paranoia, as there exists ample sociological data that supports the notion that it is *dangerous* to be Black in Canada.<sup>199</sup> Despite these studies, we are still faced with the same fundamental problem - police misuse and abuse of their powers in their interactions with African Canadians. Akwatu Khenti argues that “unbeknownst to many Canadians, Black communities in Canada have been the target of intensive policing since the inception of the War on Drugs in the 1980s, especially in the province of Ontario where most Blacks reside”.<sup>200</sup> He further argues that a: “direct result of the inordinate police focus on Black communities has been a pattern of racialized mass incarceration, exemplified by a vast overrepresentation of Blacks within the federal offender population in prisons across Canada.”<sup>201</sup>

### **Section G: Beyond Anti-Black Policing**

Anti-Black policing is one of several methods through which Black bodies are criminalized. There exist other *feeder* systems that are equally as complicit in the streaming of Black bodies into the criminal justice system, not the least of which is the educational system.<sup>202</sup> This phenomenon is often referred to as the school-to-prison pipeline.<sup>203</sup> Sibblis argues that school expulsion programs operate as carceral spaces for Black bodies.<sup>204</sup> She further explains that “the carceral spaces within the educational system are a constant reminder to black students of their abnormality, incompetence and perniciousness.”<sup>205</sup> Studies have concluded that Black students are disproportionately suspended and expelled and subjected to harsher punishments

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<sup>199</sup> *A Collective Impact*, *supra* note 3; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4.

<sup>200</sup> Akwatu Khenti, *supra* note 20 at 190.

<sup>201</sup> *Ibid.*

<sup>202</sup> Carl James, & Tana Turner, *supra* note 102.

<sup>203</sup> Christopher Mallett, “The School-to-Prison Pipeline: A Critical Review of the Punitive Paradigm Shift” (2016) 33:1 Child & Adolescent Social Work Journal 15.

<sup>204</sup> Camisha Sibblis, *supra* note 3 at 71.

<sup>205</sup> *Ibid* at 64-81.

compared to their similarly situated white counterparts.<sup>206</sup> The disciplining of Black students is, in many ways, similar to the treatment of Black offenders and suspects. Sibblis asserts that:

the civilian (student) outside of the prison is inside of another prison - the classroom. As he puts it, the outside is always already inside. For these students there is no exit-no escape in life from imprisonment and violence. If black students are criminalized and incarcerated in schools, one of their first identity-forming, socializing institutions, where can they be safe from violence? The one thing that schools-turned-carceral spaces teach the students contained within is that violence is endemic to all institutions and likely, all spaces.<sup>207</sup>

A discussion about the school-to-prison pipeline, and similar feeder engines, child welfare, etc., to the criminal justice system, is crucial in understanding the intricate and devastating web of violence experienced by Black Canadians. However, a more fulsome discussion of this phenomenon is beyond the scope of this project. Suffice it to say, addressing any one system in isolation will not properly elucidate the complex nature of anti-Black racism and its various manifestations. To fully appreciate the impact that anti-Black racism has had on an individual's life, it is critically important to understand the convergence of various oppressive experiences throughout that person's life. Anti-Black racism cannot be summed up in one explanatory statement; it is the aggregate of a lifetime of experiences rooted in slavery and intergenerational trauma. However, it should be noted that "anti-Black racism does not affect all Blacks in the same way. Just as blackness itself is hotly contested, the vile practice of anti-Black racism is also an uneven territory with varying contours".<sup>208</sup> The immediate goal of this thesis, however, is to address anti-Black racism in 'a specific' moment/experience: namely, during criminal sentencing.

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<sup>206</sup> Carl James, & Tana Turner, *supra* note 102.

<sup>207</sup> Camisha Sibblis, *supra* note 3 at 74.

<sup>208</sup> Martha Kuwee Kumsa, et al, *supra* note 75 at 25.

## **Section H: CIARs/IRCARs and Sentencing Reform (A Partial Solution?)**

Given that over-policing is one among a constellation of factors that leads to the over-incarceration of Black Canadians, it is, therefore, a partial causal explanation for the phenomenon that CIARs/IRCARs are seeking to redress. There are other sources of oppression that contribute in equal part to this problem, i.e. education, child welfare, *etc.* The routine use of IRCARs/CIARs may be a catalyst for sentencing reform, but is at best, a partial solution for the over-criminalization and disproportionate incarceration of African Canadians, and the broader problem of anti-Black racism. This issue can also be attributed to decisions made at all other phases of the criminal justice process, including legislation, policing, charging/prosecutorial discretion, plea-bargaining, adjudication by judges/juries, parole hearings, *etc.* Moreover, the over-criminalization of Black bodies also relates to broader antecedent problems of anti-Black racism that result in more African Canadians finding themselves on the “assembly line”<sup>209</sup> of the criminal justice system. To address this issue requires a radical multi-system critique and perhaps a wholesale dismantling of these structures of violence. Sentencing reform, through the extensive use of CIARs/IRCARs, is, in some sense conservative, since it seeks to work within the criminal justice system's existing norms and structures. The current norms and structures of the existing criminal justice system are flawed, and intrinsically racist, and cannot coexist with genuine racial equality.<sup>210</sup> In that vein, sentencing reform may not be a workable or desirable solution to the problem of the over-criminalization and over-incarceration of Black bodies and the broader problem of anti-Black racism.

Notwithstanding the call for a radical structural critique of our current criminal justice system, it is laudable that proponents of IRCARs/CIARs seek to use the “master’s tool to

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<sup>209</sup> Stephanos Bibas, *The Machinery of Criminal Justice* (New York: Oxford University Press, 2012).

<sup>210</sup> Richard Delgado & Jean Stefancic, *supra* note 39 at 26; Paul Butler, *supra* note 50 at 680.

dismantle the master's house.”<sup>211</sup>By attempting to achieve racial equality within a structure that is infected with racism, IRCARs/CIARs, in a sense, seek to have the system ‘turn on itself.’ The aim is to create the procedural space to discuss Blackness – not merely as a means of acknowledging what is already a notorious fact, but by fundamentally altering the current sentencing regime and its hostility to Black bodies. However, there is reason to believe that this change may only be achieved through legislative intervention. For now, sentencing reform for Black Canadians may only be achieved through judicial intervention sparked by the increased usage of IRCARs/CIARs. These reports are designed to highlight specific cultural, social, and political mitigating factors that ought to be considered in the sentencing of African Canadian offenders.<sup>212</sup>The objective of these reports, which will be discussed in more detail below, is to, *inter alia*, highlight an offender's Blackness in order to, paradoxically, diminish the racist attributions generally assigned to Blackness. The idea is that emphasizing race, during the sentencing phase, will lead to more proportionate sentences. A primary objective of progressive criminal justice reform, arguably, should be the promotion and facilitation of proportionate sentences for Black Canadians.

As discussed above, bias at the sentencing phase results in harsher and disproportionate sentences for Black offenders compared to their similarly-situated white counterparts, thereby exacerbating the problem of the over-incarceration of Black bodies in correctional facilities at both the Federal and Provincial level.<sup>213</sup>IRCARs/CIARs strive to draw attention to this phenomenon and attempt to ameliorate this injustice. They aim to propagate a counter-narrative that rejects the myth of colour-blindness and provides an interpretive frame that displays a more

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<sup>211</sup> Paul Butler, *ibid* at 680. See generally Audre Lorde, *supra* note 52 at 110-114.

<sup>212</sup> See for eg. Barbara A. Hudson, *Supra* note 28 at 205; Michael Plaxton, *supra* note 28; See generally Dale E. Ives, *Supra* note 28 at 114 –155.

<sup>213</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4.

robust picture of the offender. The next section of this thesis will explore whether IRCARs/CIARs can be salutary within the current sentencing regime.



## **Chapter Three: Sentencing Theory and the Black Experience**

### **Section A: Proportionality and Blame**

Why we punish and how we punish are deep philosophical questions that are brought into sharp relief when we consider the fundamental principle of criminal sentencing.<sup>214</sup> The current sentencing regime under section 718 of the *Criminal Code* is premised on the fundamental principle of proportionality and retribution.<sup>215</sup> While retribution is not expressly part of the section 718 framework, it is implicit in the notion of proportionality as enshrined in the *Criminal Code* and expounded by the Court.<sup>216</sup> Both the fundamental principle of proportionality and retribution aims to apportion and calibrate blame. Proportionate sentences/punishments must consider both the gravity of the crime and the offender's level of blameworthiness.<sup>217</sup> However, blameworthiness, particularly in the context of structural racism, is profoundly controversial and anathema to Black communities. The concept of blame is rendered hollow when we are considering the crimes committed by people who have minimal opportunities and options due to structural violence. Black Canadians are stereotyped as incorrigible, inherently violent, blameworthy and dangerous due to racist stereotypes that were part of the logic of slavery, and today, we determine criminal sentences in part by trying to determine the extent to which an offender is: violent, incorrigible, blameworthy and dangerous. As Paul Butler argues, we are essentially “punishing people for “negative” reactions to racist, oppressive conditions.”<sup>218</sup>

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<sup>214</sup> Andrew von Hirsch, *supra* note 30.

<sup>215</sup> *Criminal Code*, RSC 1985, c C-46.

<sup>216</sup> *Supra* note 34.

<sup>217</sup> Andrew von Hirsch, “Proportionality in the Philosophy of Punishment” (1992) 16 *Crime & Just.* 55.

<sup>218</sup> Paul Butler, *supra* note 50 at 716.

Scholars assert that proportionality functions as a restraint mechanism against grossly severe punishments or those that are unjustifiably lenient.<sup>219</sup> The offender ought to be punished fairly - no more or less than he deserves. Thus, the duty of a sentencing judge is to strike an appropriate and fair balance of just deserts. He or she must weigh complicated and contradictory factors.<sup>220</sup> Some scholars have examined whether social deprivation should be a factor in this balancing exercise.<sup>221</sup> Others assert that “the institution of criminal punishment is not an appropriate ‘instrument’ to resolve social problems.”<sup>222</sup> Retributivists assert that proportionality is an equitable concept because it seeks to curb arbitrary punishment and ensure parity in sentencing allocation.<sup>223</sup> According to Von Hirsch “when proportionality is disregarded, offenders are unfairly visited, through the penalties imposed on them, with more implicit blame (or less) than the actual blameworthiness of their conduct warrants.”<sup>224</sup> Therefore, proportionality, from a retributive perspective, is understood as a theory of justice that allocates punishment based on the fair distribution of blame/desert.

As mentioned above, blameworthiness, as it is understood within our current sentencing framework, is an insidious and controversial concept within Black communities. Strict adherence to the proportionality/blameworthiness framework may actually result in injustice for Black offenders. As Carol Steiker argues, “retributivism’s chief distortion is its inability to take account of the effects of widespread social and economic inequality on its central determination of

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<sup>219</sup> Richard G. Fox, *supra* note 36 at 495.

<sup>220</sup> For example, under the 718 sentencing framework judges are required to balance both retributive and utilitarian considerations. Retributivism is retrospective in that it aims to punish for past conduct, whereas utilitarianism is forward-looking and attempts to use the offender’s punishment as a means of preventing future criminal behavior by the offender and the wider public. See for eg. *supra* note 34 at 79.

<sup>221</sup> Barbara A. Hudson, *supra* note 28.

<sup>222</sup> Andrew von Hirsch, “Proportionate sentences: A Desert Perspective”. In: A. von Hirsch and A. Ashworth, ed., *Principled Sentencing: Readings on Theory and Policy*, 2nd ed. (Oxford: Hart Publishing 1998).

<sup>223</sup> Andrew von Hirsch, “Proportionate sentences: A Desert Perspective”, *ibid*; Andrew von Hirsch, *supra* note 214 at 70.

<sup>224</sup> Andrew von Hirsch, *ibid*.

desert.”<sup>225</sup>There is ample evidence to suggest that our system of criminal justice is skewed towards the over-punishment of Black offenders.<sup>226</sup>Some scholars have even advocated for the introduction of mercy into criminal sentencing as a means of (over)correcting for this “punitive turn.”<sup>227</sup>

## **Section B: Creating Space for Mercy**

Mercy is an elusive concept that has intrigued theologians, philosophers and jurists for generations.<sup>228</sup>The scholarly literature on mercy is abundant and spans both time and discipline. Thus, it is beyond the scope of this project to provide an exhaustive treatment of mercy. It will suffice, however, for current purposes, to briefly sketch three (3) possible ways in which mercy can be understood within criminal sentencing, specifically in the context of race-based sentencing. First, the thesis will consider whether, in some instances, it is appropriate for sentencing judges to dispense mercy as a means of displacing justice in pursuit of other relevant social goals.<sup>229</sup>Second, it will discuss whether proportionality can be achieved through the granting of merciful sentences that aim to (over)correct the inherent bias towards over-punishing Black Canadians.<sup>230</sup>Third, it will explore how mercy tracks with notions of hierarchy and degradation.<sup>231</sup>

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<sup>225</sup> Carol Steiker, “The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System” in Michael Klarman, David Skeel, & Carol Steiker, *The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* (New York: Cambridge University Press, 2012) at 224.

<sup>226</sup> It has been stressed in this thesis that Black Canadians are overrepresented in the criminal process and incarcerated in high numbers in both Federal and Provincial correctional facilities.

<sup>227</sup> *Supra* note 222 at 222.

<sup>228</sup> Eric L. Muller, “The Virtue of Mercy in Criminal Sentencing” (1993) 24:1 Seton Hall L Rev at 288.

Richard G. Fox, “When Justice Sheds a Tear: The Place of Mercy in Sentencing” (1999) 25:1 Monash U L Rev 1.

<sup>229</sup> Carol Steiker, “Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration” in R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros, *The Boundaries of the Criminal Law* (Oxford ; New York : Oxford University Press, 2010) at 38.

<sup>230</sup> See Carol Steiker, “The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System”, *supra* note 222; See also Carol Steiker, “Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration”, *ibid* at 30.

<sup>231</sup> James Q. Whitman, *supra* note 183.

Before commencing a more specific discussion on how mercy may achieve racial justice, it is critical to provide a brief definition of the concept. In the sentencing context, mercy connotes the granting of a *gift*, in the form of reduced punishment, from a sentencing judge to an offender.<sup>232</sup> The offender has no right, nor does he deserve this gift on account of him conducting himself in a manner that appropriately attracts censure or punishment. Therefore, when a sentencing judge dispenses mercy, she is acting magnanimously towards someone undeserving. Some scholars, however, argue that mercy may be fundamentally incompatible with the demands of justice insofar as granting mercy, in some cases, may require deviations from justice.<sup>233</sup> There is a concern that mercy cannot coexist with justice as the demands of both are, at times, mutually exclusive. The question is, “whether mercy can be a public value at all and whether it has any place in a properly functioning criminal justice system.”<sup>234</sup> For example, imagine an offender who is convicted of committing a serious offence that ought to attract a significant jail term, but who instead receives probation on account of the sentencing judge showing him leniency. From a retributivist perspective, such a result is not in accordance with the principle of proportionality, which requires an offender to be punished commensurate with the seriousness of the offence and his level of blameworthiness.<sup>235</sup> However, while mercy may be in contention with justice, this does not render mercy an illegitimate factor for consideration in a retributive/proportionality-based sentencing framework.<sup>236</sup>

It is possible that in some situations to achieve justice, particularly racial justice, it may be necessary to temper the demands of justice with mercy. Mercy may provide a way for thinking through other goals the State can legitimately pursue, apart from, or in addition to the

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<sup>232</sup> Nathan Brett, “Mercy and Criminal Justice: A Plea for Mercy” (1992) 5:1 Can JL & Jur at 82.

<sup>233</sup> R A Duff, “The Intrusion of Mercy” (2007) 4:2 Ohio State J of Crim L 361.

<sup>234</sup> Carol Steiker, *supra* note 222 at 221.

<sup>235</sup> *Supra* note 225 at 10.

<sup>236</sup> Nathan Brett, *supra* note 229; *Supra* note 225; Richard G. Fox, *ibid*.

imperatives of proportionate justice. It frames alternative imperatives that may exist in contention with retribution/proportionality accounts of sentencing but is also properly considered by the criminal law and the State.<sup>237</sup> On this account, there may be justifiable reasons to deviate from proportionate justice through the granting of disproportionately reduced sentences to Black offenders. For example, the State may grant mercy as a means of seeking to redress historical wrongs, which serves to communicate messages to the community and the accused person that does not fixate on the offender's blameworthiness.<sup>238</sup> There is ongoing debate by retributivist scholars around the appropriateness of mercy within the criminal justice system, particularly as a means of redressing social ills. There are, however, examples in the procedural realm, for instance, under subsection 24(2) of the *Charter*, where judges routinely compromise truth-seeking values in order to condemn improper State conduct.<sup>239</sup> In that vein, it is reasonable for CIARs/IRCARs to seek deviations from retributive/proportionality values in order to condemn State and societal behaviour as it relates to virulent anti-Black racism.

However, mercy talk, like race talk, elicits discomfort and controversy. Indeed, this approach would be considered a radical departure from the current sentencing paradigm contemplated by section 718 of the *Criminal Code*, and as expounded in *Gladue* and *Ipeelee*.<sup>240</sup> Under this regime, proportionality sets both the ceiling and floor for punishment. Thus, any further considerations simply operate to assist in calibrating a proportionate sentence. The goal is to allocate punishment based on a fair distribution of blame/desert. However, blame is a

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<sup>237</sup> See generally Carol Steiker, "Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration" in R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros, *The Boundaries of the Criminal Law* (Oxford ; New York : Oxford University Press, 2010).

<sup>238</sup> Carmela Murdocca, *supra* note 23; Carmela Murdocca, "National Responsibility and Systemic Racism in Criminal Sentencing: The Case of *R. v. Hamilton*" in Nicholas Blomley and Sean Robertson, eds. *The Place of Justice* (Vancouver: Fernwood Publishing, 2006) 67.

<sup>239</sup> *Charter*.

<sup>240</sup> *Supra* note 29; *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC)

deceptive concept within Black communities. Indeed, what may be deemed as a proportionate sentence for a Black offender may, in fact, on more objective measures, be disproportionate and unduly harsh. As Steiker argues:

if sentences were subject to review for comparative proportionality (i.e., have a similarly harsh sentences been imposed in the past for similar conduct?) and for equal protection (i.e., are different racial, ethnic, and geographic groups sentenced similarly for similar conduct?), both the amount and the distribution of criminal punishment would likely change for the better.<sup>241</sup>

She further asserts that mercy is not incompatible with proportionality if it is regarded as corrective, *i.e.* as a means of prompting proportionality in systems that are predictably too harsh.<sup>242</sup> For instance, given that certain people are routinely over-punished, a sentence that seems “*merciful*” in the sense of being disproportionately low, maybe more commensurate with blameworthiness, and hence more proportionate. Indeed, equal sentences for similarly situated offenders, without regard to demographic status, are not *merciful* – they are the baseline for formal equality. To achieve this goal, it is necessary to radically overcorrect for the inherent bias towards harshness when dealing with Black offenders. In that vein, to correct this bias may require sentencing judges to grant, what may appear at first glance, to be a lenient sentence but one which is, in fact, proportionate.

At the same time, “mercy” suggests attention to other normative considerations beyond retributivist/proportionate punishment, such as forgiveness, humility, etc. that could properly play a role in criminal justice.<sup>243</sup> However, there are concerns that mercy may track with notions of hierarchy, power and degradation.<sup>244</sup> On this account, mercy involves performances of power differentials, which in some cases may exacerbate and reinforce prevailing societal

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<sup>241</sup> Carol Steiker, *supra* note 222 at 219.

<sup>242</sup> *Ibid* at 222-223.

<sup>243</sup> Stephanos Bibas, “Forgiveness in Criminal Procedure” (2007) 4:2 Ohio State J of Crim L 329.

<sup>244</sup> James Q. Whitman, *supra* note 183 at 32-39.

hierarchies.<sup>245</sup> As a Black man, who has been on both sides of this punitive turn, as an offender and then defence counsel, I am attracted to the notion that racial justice can displace or at the very least, temper the fervour of retribution. However, some of the ex-offenders interviewed for this project did not desire mercy/leniency - instead, they sought equal treatment (same treatment as his similarly-situated white counterpart). One interviewee opined that he desired the same treatment as a white accused and did not want his race or the circumstances brought on by that status, to strip him of the dignity of being punished like a white man who committed a comparable offence. He remarked that *if I deserve the punishment, then I deserve it. To treat me otherwise is undignified.*<sup>246</sup> This statement suggests that the ex-offender would rather the adoption of the 'fiction' of colour-blindness in his/her sentencing analysis. Another interviewee, worried that an over-exaggeration of his race may result in the aggravation of his sentence; thus, he prescribes utter silence about race, whether for mitigation purposes or as a plea for mercy.<sup>247</sup> It is not difficult to see how a plea for mercy or leniency may be perceived as an affront to a Black man's dignity. The wounds of slavery are still fresh, and the images are etched in the Black community's collective psyche. Thus, pleading to a white judge may be construed as a reversion in dignity. Equal treatment, even if it means harsh treatment, is more welcomed than preferential treatment grounded in white compassion.

The current punitive climate disproportionately impacts Black Canadians, thereby 'drying' up what little mercy may exist for Black offenders facing punishment. This argument, however, presupposes that mercy can/should only flow uni-directionally. IRCARs/CIARs operate as a means of promoting and facilitating a bilateral flow of mercy. This approach can be

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<sup>245</sup> *Ibid* at 32-39.

<sup>246</sup> M.J. is 38-year-old Black male. He is a native English speaker. His comments were, however, paraphrased for clarity. I did not, however, tamper with the substance of his comment.

<sup>247</sup> A.W. is 48-year-old Black male. His comments were provided in Jamaican Patois and translated by me.

conceptualized as a *shared grant of mercy*. One in which both parties, the State and Black offenders, seek and grant mercy. The proposed approach imagines a situation whereby the State seeks mercy from Black Canadians by providing quantitatively and qualitatively better sentences for Black offenders, and in turn, a Black offender may feel morally emancipated when he or she makes a plea for mercy. This approach is a dignity affirming compromise. It is not about compensating for past wrongs; instead, it serves as the repatriation of stolen/lost dignity.

### **Section C: Personal Narrative (My Experience with Mercy)**

I have been arrested many times. Several of those arrests resulted in criminal charges. Fortunately, I have only ever been found guilty once. This finding of guilt was the result of a crack charge I caught following a sloppy drug deal. I had just left the home of one of my customers (“custy”). As I left his house, I broke a few cardinal rules: I placed the remaining crack in my pocket; I permitted my driver, a custy, to travel with his crack pipe; and, I also travelled with a friend who was “packing” (armed with a gun). As we drove along the road, I sensed that we were being followed. I attempted to tell the driver to find a different route, but by that time, it was too late. I saw the lights and heard the sirens. It was an undercover police vehicle. They approached the car with guns drawn. They saw the driver’s crack pipe in plain sight. I was ordered out of the vehicle and searched. The police found a gram of crack and a knife in my pants pocket. My friend was searched, and a gun was found in his waistband. We were all arrested and charged. I was charged with possessing one (1) gram of crack cocaine for the purpose of trafficking and possessing a dangerous weapon. I managed to secure bail.

Following a few court appearances, my lawyer implored me to plead guilty. The crown prosecutor wanted a jail sentence. My lawyer sought a conditional discharge or suspended sentence. I pleaded guilty. My lawyer made his argument for a conditional discharge. He



emphasized that I did not have a criminal record, I was caught with only a small amount of crack, I was a youthful offender, and I was enrolled in an adult high school program. The Crown argued for jail. He emphasized the fact that my co-accused was found with a gun. He also relied on cases that, despite the mitigating factors I listed, still supported a short stint in jail. After the submissions, the judge invited me to address the court. I felt a sense of dissociation.

The entire courtroom was white. I was in Gatineau, Quebec. The judge, defence lawyer, Crown, court staff, police officers and court service officers were all white. I was the only Black body in the courtroom. They were all speaking French. My lawyer and the judge were the only individuals that spoke to me in English. I stared blankly at the judge and muttered something that I now realize must have been incoherent drivel. The judge thanked me and then stared at me sternly. He spoke perfect English. He was ‘perfectly’ white. No one mentioned anything about my race or culture. But at that moment, I felt extremely Black. I whispered to myself: I am going to jail. Then the judge said something that still puzzles me to this day. He said, Mr. Jones, you are young and have potential. I will not burden you with a criminal record. I accept your lawyer’s submissions and will grant you a conditional discharge. I was startled. As were the Crown and the police officers. I walked out of the courthouse not understanding what had taken place. The lesson I learned at the time was to avoid selling drugs in Quebec. However, the judge’s words stayed with me. They haunted me. He saw potential in me and a person deserving of compassion, whereas all I saw in him was the whiteness that I was taught to be frightened of.

#### **Section D: The Gladue Influence**

African Canadians are not the only targets of racism within the criminal justice system. Evidence suggests that Indigenous peoples are also among the oppressed victims of the

system.<sup>248</sup> The Court examined this issue in the case of *R v Gladue*.<sup>249</sup> The appellant, Jamie Tanis Gladue, pled guilty to manslaughter in the stabbing death of her common-law partner. At her sentencing hearing, the judge determined that he would not consider the indigeneity of both the accused and the victim. He sentenced her to three years imprisonment. Ms. Gladue's appeal to the British Columbia Court of Appeal was dismissed. The issue before the Court was the proper interpretation of subsection 718.2(e) of the *Criminal Code*, which reads as follows:

**718.2** A court that imposes a sentence shall also take into consideration the following principles:

...  
(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.<sup>250</sup>

Subsection 718.2(e) was introduced in 1996, following numerous, longstanding calls for judicial and legislative action.<sup>251</sup> For the first time, Parliament explicitly recognized the need for a different sentencing framework for Indigenous offenders. In *Gladue*, the Court constructed a new sentencing methodology for lower court judges tasked with sentencing Indigenous offenders.<sup>252</sup> The Court reaffirmed its position in *R v Wells* and later in *R v Ipeelee*.<sup>253</sup> The restraint principle, enshrined in subsection 718.2(e), instructs courts to use imprisonment as a last resort, paying particular attention to the circumstances of Aboriginal offenders. The Court discussed that there existed an over-incarceration problem in Canada, particularly as it relates to Indigenous offenders. They also found that "overreliance upon incarceration is a problem with the general

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<sup>248</sup>Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (2018) <[https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/pdf/Rudin.pdf](https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf)>

<sup>249</sup> *Supra* note 237.

<sup>250</sup> *Criminal Code*, RSC 1985, c C-46 at ss.718.2(e)

<sup>251</sup> Jonathan Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008), 40 S.C.L.R. (2d) 687.

<sup>252</sup> *Supra* note 237 at 93.

<sup>253</sup> *R v Wells*, [2000] 1 S.C.R. 207; *supra* note 29.

population (but) is of much greater concern in the sentencing of aboriginal Canadians.”<sup>254</sup>The Court determined that subsection 718.2(e) is remedial legislation that “is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.”<sup>255</sup>Thus, subsection 718.2(e) provided the statutory framework that ushered in the Court’s methodological shift in the sentencing of Indigenous offenders.

Since this landmark decision, courts have been empowered to consider relevant systemic and background factors in the sentencing of an Indigenous offender. Since *Gladue*, defence lawyers proffer systemic and background evidence in the form of a *Gladue* report to provide the sentencing judge with a picture of the offender in order to provide the necessary circumstances for judicial consideration.<sup>256</sup>This evidence is considered along with the judge’s own taking of judicial notice about the plight of Indigenous peoples in Canada, both in a historical and contemporaneous context.<sup>257</sup>

The critical thing to note is that subsection 718.2(e) applies to all offenders, not just Indigenous offenders.<sup>258</sup>Jonathan Rudin has even asserted that this subsection has actually “largely benefitted non-Aboriginal people.”<sup>259</sup>Though the subsection mentions all offenders, the *Gladue* decision was meant to address and attempt to ameliorate the over-imprisonment of Indigenous peoples.<sup>260</sup>By adhering to the principles expounded in *Gladue*, sentencing “judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing.”<sup>261</sup>The

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<sup>254</sup> *Supra* note 237 at 58.

<sup>255</sup> *Ibid* at 93.

<sup>256</sup> *Supra* note 29 at 60.

<sup>257</sup> *Ibid* at 59.

<sup>258</sup> *Supra* note 237 at 70.

<sup>259</sup> Jonathan Rudin, *supra* note 248 at para 18 (Lexis Nexis).

<sup>260</sup> *Supra* note 29 at 66.

<sup>261</sup> *Ibid* at 67.

Court dismissed criticisms that the subsection and its interpretation amounted to nothing more than a race-based discount that “invites sentencing judges to impose more lenient sentences” on Aboriginal offenders.<sup>262</sup> The Court further explained that systemic and background factors might have a significant impact on the moral blameworthiness of an offender insofar that it may constrain that individual's options for “positive development.”<sup>263</sup> As Lebel J. stated in *Ipeelee*:

many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development....The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment per se.<sup>264</sup>

It is, however, critical to explore the post-*Gladue* scholarship that criticized the decision's efficacy in ameliorating the Indigenous incarceration problem in Canada. For example, Phillip Stenning and Julian V. Roberts criticized the Court's prioritization of indigeneity where, they argue, the critical cause for concern was social disadvantage.<sup>265</sup> Essentially these scholars argued that there was nothing unique or special about this particular offender population. The Indigenous experience within the criminal justice system was not any different from other marginalized and socially disadvantaged groups. Thus, no special recognition should be given to this group lest it results in unfairness to similarly situated offenders.<sup>266</sup> Critics of this argument, particularly Jonathan Rudin and Kent Roach, responded by explaining that how Aboriginal offenders experience social disadvantage is different from other groups that do not share the history that Aboriginal peoples have with the Canadian State. This history is rooted in

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<sup>262</sup> Philip Stenning and Julian V. Roberts, “Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders” (2001) 64 Sask. L. Rev. 137; *Ipeelee*, *ibid* at 68.

<sup>263</sup> *Supra* note 29 at 73.

<sup>264</sup> *Ibid*.

<sup>265</sup> *Supra* note 259.

<sup>266</sup> *Ibid* at para 33 (LexisNexis).

colonialism.<sup>267</sup>In a later paper, Rudin, however, questions the efficacy of the *Gladue* and *Ipeelee* decisions on reducing incarceration rates.<sup>268</sup>Indeed, since the *Gladue* decision, Indigenous incarceration rates have remained at disproportionate levels.<sup>269</sup>

### **Section E: Applying *Gladue* Principles to Black offenders?**

There is a paucity of literature examining the connections between anti-Black racism and criminal sentencing. Canadian Scholars have instead focused primarily on the relationship between indigeneity and sentencing. This scholarly focus is understandable, given the disproportionate rates at which Indigenous people (male and female) are imprisoned in Canadian penal institutions; and, the fact that, in response, Canadian legislators and judges have developed a distinct sentencing regime for Indigenous offenders. In *Gladue*, the Court held that judges tasked with sentencing an Indigenous offender must consider:

(a)the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.<sup>270</sup>

This case-specific information may take the form of a presentence report/or *Gladue* report that compiles relevant systemic and background information about the offender and may make recommendations about appropriate culturally salient sentences.<sup>271</sup>In this sense, *Gladue* reports are not analogous to section 721 pre-sentence reports (“PSRs”), which generally does not include cultural relevant information or provides the basis for restorative sentencing options.<sup>272</sup>*Gladue* reports are prepared by trained Indigenous caseworkers, unlike PSRs that are often prepared by

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<sup>267</sup> Jonathan Rudin and Kent Roach, “Broken Promises: A Response to Stenning and Roberts' "Empty Promises"” (2002), 65 Sask. L. Rev. at 6.

<sup>268</sup> Jonathan Rudin, *supra* note 248.

<sup>269</sup> Jamil Malakieh, *supra* note 14; Jonathan Rudin, *supra* note 245.

<sup>270</sup> *Supra* note 237 at 93.

<sup>271</sup> *Ibid.*

<sup>272</sup> *Criminal Code*, RSC 1985, c C-46 at s 721; See generally Kelly Hannah-Moffat and Paula Maurutto, “Re-contextualizing pre-sentence reports: Risk and race” (2010) 12:3 Punishment & Society 262.

probation officers who may lack the necessary cultural lens to produce a report that aids a sentencing judge in formulating a proportionate sentence for an Indigenous offender.<sup>273</sup> CIARs/IRCARS are similar to *Gladue* reports insofar as they are often prepared by clinical social workers and race and crime scholars with an anti-oppression and anti-racist lens. They provide an assessment of the offender's background and social circumstances and how these likely influenced the offender's decision to commit the offence for which he or she is being sentenced. Like, *Gladue* reports, CIARs/IRCARS are not simply pre-sentence reports. They do, however, share some similarities with *Gladue* reports. For instance, CIARs provide judges with insights about systemic racism and other structural inequalities. They also provide "a more textured, multi-dimensional framework for understanding the defendant, his background and his behaviours."<sup>274</sup>

While there exists no clear legislative and jurisprudential basis to consider the social and cultural circumstances of Black offenders when crafting a sentence, in theory, CIARs/IRCARS like *Gladue* reports should assist sentencing judges in achieving proportionality and advance current sentencing goals (i.e. denunciation, deterrence, rehabilitation, etc.). However, there are questions around whether these sentencing reference points can be harnessed to promote justice. It is essential to think critically about these sentencing goals and the notion of proportionality considering the current debates around general sentencing theory expounded above. Given that the blueprint and justification for CIARs/IRCARS are similar to the methodology/structure offered by the Court in *Gladue*, *Wells* and *Ipeelee*, scholarly analyses of *Gladue* reports can be cautiously applied to the CIAR/IRCAR context. Indeed, the Indigenous experience is instructive

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<sup>273</sup> *Ibid.*

<sup>274</sup> *R v "X"*, *supra* note 41 at 198.

in understanding the potential and pitfalls of the CIARs/IRCARs movement, given that this movement is in its infancy.

It may also be helpful to consider the potential and pitfalls around the fight against anti-Black racial profiling. It is widely accepted that the criminalization of Blackness is the impetus behind anti-Black policing, and the disparity in Black incarceration rates.<sup>275</sup> Despite this recognition, anti-Black policing practices, for instance carding, pretext stops, overcharging, unreasonable searches, and arbitrary detentions, continue to result in a high number of prosecutions. It is, however, rarely the case that defence counsel will challenge the police's misconduct, and if challenged it is seldom accepted by the court.<sup>276</sup> However, there have been some notable successes, most recently in *Le*, which will be discussed in detail below.

## **Section F: Confronting Blackness in Sentencing**

Canadian courts inadequately address the issue of Blackness, and criminal justice, not just at the guilt phase of the criminal process but more acutely at sentencing. It has only been recently that some judges have begun to consider with any seriousness the role Blackness plays in sentencing considerations.<sup>277</sup> The IRCAR/CIAR movement has proved to be a sort of renaissance insofar as it may have sparked a willingness for some defence lawyers, crowns and

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<sup>275</sup> *Paying the Price*, *supra* note 4; *A Collective Impact*, *supra* note 3; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4.

<sup>276</sup> The few cases that have directly taken up this thorny issue have generally explored it within the context of Section 8 and 9 *Charter* applications, and the jury selection process; and if raised, Blackness is usually silenced or marginally addressed. Thus, Blackness is not an essential topic for judicial contemplation within the criminal trial process. The reasons for this is a complex mixture of litigation strategy, professional ethics, law school training, and discomfort on the part of lawyers and judges to engage in race talk. Race talk is generally the province of Human Rights Tribunals. For tactical reasons, it is viewed as more advantageous to forego raising a defence that impugns the conduct of the arresting officer (Custom and Border officers, etc.), or the decision of the Crown prosecutor to prosecute the offender. Thus, while race may be a motivating factor in the police, Crown or Border officer's decision to arrest, search, charge or prosecute a Black accused, the matter is sidelined. The result is a record that is usually devoid of race – despite the centrality of the offender's race in the reasons for him or her being before the courts.

<sup>277</sup> *R v "X"*, *supra* note 41; *Jackson*, *supra* note 42.

judges to begin to meaningfully engage with the notion of Blackness and its place in Canadian sentencing law.<sup>278</sup>

IRCARs/CIARs were introduced, respectively, in 2014 in Nova Scotia<sup>279</sup> and 2018 in Ontario.<sup>280</sup> Before the introduction of these reports, the Court of Appeal for Ontario in *R v Borde* (“*Borde*”) held that in some instances sentencing judges are justified in considering systemic and background factors - if those factors are linked to the commission of the offence and the offender’s community values.<sup>281</sup> Since *Borde*, there have been several reported Ontario and Nova Scotia sentencing decisions where the race and culture of African-Canadian offenders are explicitly discussed.<sup>282</sup> A few decisions in the Provinces of British Columbia and Manitoba and the Territory of Yukon that have dealt with this issue tangentially.<sup>283</sup> Judges in Nova Scotia and Ontario have, however, taken up this issue in a more direct manner by accepting CIARs/IRCARs, or by taking judicial notice, to assist them in understanding the links between Blackness and the offence committed. However, given the decision in *Hamilton*, one may

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<sup>278</sup> Arguably, the reluctance to engage with Blackness during sentencing is a direct consequence of the reluctance of sentencing judges to tackle Blackness/race at any stage of the criminal process. Consequently, sentencing courts across Canada have been virtually silent on the issue of Blackness.

<sup>279</sup> CIARs/ IRCARs were first used in Nova Scotia which is fitting given the longstanding history and contemporaneous manifestations of anti-Black racism in that Province. African Nova Scotians did not only experience slavery but also post-slavery discrimination in almost every area of social life. Indeed, there is an unbroken genealogy of virulent and invidious anti-Black racism in Nova Scotia that spans generations. See eg. Constance Backhouse, *supra* note 85; Royal Commission on the Donald Marshall, Jr., Prosecution (Nova Scotia: 1989).

<sup>280</sup> *R v “X”*, *supra* note 41; *Jackson*, *supra* note 42.

<sup>281</sup> *R v Borde*, 2003 CanLII 4187 (ON CA) at para 32.

<sup>282</sup> *R v G.B.*, [2003] O.J. No. 3218; *Hamilton*, *supra* note 26; *R v Spencer*, 2004 CanLII 5550 (ON CA); *R v Ferrigon*, 2007 CanLII 16828 (ON SC); *R v Duncan et al.*, 2012 CanLII 35904 (ON SC); *R v Reid*, 2016 ONSC 8210; *Jackson*, *supra* note 42; *R v Morris*, 2018 ONSC 5186; *R v T.J.T.*, 2018 ONSC 5280; *R v Biya*, 2018 ONSC 6887 (CanLII); *R v Brissett and Francis*, 2018 ONSC 4957; *R v Kabanga-Muanza*, 2019 ONSC 1161 (CanLII); *R v Shallow*, 2019 ONSC 403 (CanLII); *R v “X”*, *supra* note 41; *R v E. S.*, 2015 NSPC 81; *R v D.B.*, 2015 NSPC 82; *R v R.D.*, 2015 NSPC 83; *R v Gabriel*, 2017 NSSC 90; *R v Downey*, 2017 NSSC 302; *R v Boutilier*, 2017 NSSC 308; *J.C. (Re)*, 2017 NSPC 14; *R v N.W.*, 2018 NSPC 14; *R v Perry*, 2018 NSSC 16; *R v Gerald Desmond* 2018 NSSC 338; *R v Riley*, 2019 NSSC 92.

<sup>283</sup> *R v Diabikulu*, 2016 BCPC 390; *R v Deng* 2017 BCPC 225; *R v Ferguson*, 2018 BCSC 1523; *R v Ngeruka*, 2015 YKTC 22; *R v Hailemolokot et al.*, 2013 MBQB 285.



question the efficacy of CIARs/IRCAs in Ontario.<sup>284</sup> This decision stands for the proposition that an offender's membership in a historically marginalized, oppressed and disadvantaged group does not in and of itself justify mitigation of sentence.<sup>285</sup> Despite this challenge, some lawyers have recently been deploying CIARs/IRCAs as a means of highlight specific cultural, social, and political mitigating factors that ought to be considered in the sentencing of African Canadian offenders.

*R v "X"* in Nova Scotia and *Jackson*, in Ontario, are the first cases to utilize CIARs/IRCAs.<sup>286</sup> In the seminal case of *X*, defence counsel sought to have an expert in race and culture qualified as an expert and also to have his report on the impact of race and culture adduced into evidence. The facts of this case, as will be explored below, demonstrated a similar 'brand' of Black criminality and offender typology. The offender is a stereotypically angry, reckless, violent young-Black-male who was raised by a single mother. His offending behaviour is equally as predictable: usually involving the possession or trafficking of crack cocaine, shootings, homicides, and unlawful possession of firearms and ammunition. CIARs/IRCAs are similar to *Gladue* reports insofar as they are used to provide critical systemic and background factors in the sentencing of Black offenders. These reports also address, *inter alia*, anti-Black racism and aim to promote better, more tailored and proportionate sentences for Black offenders. They strive to construct a sentencing methodology that balances the significance of the twin principles of individual responsibility and proportionality while incorporating the cultural

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<sup>284</sup> *Hamilton*, *supra* note 26.

<sup>285</sup> *Ibid* at 133.

<sup>286</sup> Before those cases, Defence counsel would simply, raise the issue of the offender's race and culture to provide the sentencing judge with some context to assist him/her in arriving at a proportionate sentence. See for example: *R v Ferrigon*, 2007 CanLII 16828 (ON SC); *R v Duncan et al.*, 2012 CanLII 35904 (ON SC). There are recent cases, however, where counsel does not submit a CIAR/IRCA report. See for example: *R v Reid*, 2016 ONSC 8210. *R v Gerald Desmond* 2018 NSCC 338; *R v Brissett and Francis*, *supra* note 279; *R v Williams*, 2018 ONSC 5409; *R v Elvira*, 2018 ONSC 7008; *R v Nimaga*, 2018 ONCJ 795.

legacies and historical oppressions and their role in the sentencing of Black bodies/offenders. In *Gladue* it was held that “systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well.”<sup>287</sup> Like Indigenous offenders, the plight of African Canadian offenders in the Canadian criminal justice system is well recognized.<sup>288</sup> The aim is not to equate the plight of both groups. Such a conflation would diminish the unique relationship that each group has with the State. In *Gladue*, and later in *Wells*, and *Ipeelee* the Court affirmed the uniqueness of Indigenous cultures and offenders. The Court’s affirmation of this group’s uniqueness is not to be confused as a euphemism for sacredness.<sup>289</sup> Some critics argue that all socially disadvantaged people face similar challenges before sentencing courts and therefore, social disadvantage should be the primary factor for consideration.<sup>290</sup> Recognition of race or social disadvantage, however, has largely been rendered hollow by the work of racially biased police officers, prosecutors, and judges.

There is little scholarly and jurisprudential focus on the role that an African Canadian offender’s race, colour and ethnicity should or does play in the crafting of a fit and just sentence. Some courts have grappled with this issue but with minimal success<sup>291</sup>, which raises the question: is Blackness being discounted at the sentencing stage of the criminal process? Alternatively, do we run the risk of reducing Blackness as merely a tool for sentencing mitigation? More to the point, does the reliance or utilization of CIARs/IRCARS in the sentencing of African Canadian offenders deflect from individual responsibility and

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<sup>287</sup> *Supra* note 237 at 68.

<sup>288</sup> Common Ground - An Examination of Similarities between Black and Aboriginal Communities (2009), online: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/cmmn-grnd/index-en.aspx>

<sup>289</sup> Philip Stenning and Julian V. Roberts, “Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders” (2001) 64 Sask. L. Rev. 137.

<sup>290</sup> *Ibid.*

<sup>291</sup> See for example *Morris*, *supra* note 279, which is currently scheduled to be appealed.

proportionality and places undue emphasis on the cultural legacies and historical oppressions, mistreatment and disadvantages of African Canadians? There is currently no legislative or jurisprudential basis for CIARs/IRCARS; in fact, one of the only favourable judicial treatment of this sentencing innovation in Ontario is under appeal.<sup>292</sup> An IRCAR writer interviewed for this project remarked that the outcome of the *R v Morris* (“*Morris*”) appeal would either advance racial justice for Black Canadians or set this group back 20 years.<sup>293</sup> She commented that the swiftness of the reaction to *Morris* might necessitate some legislative input or policy shift. One of the defence lawyers that was interviewed shared her concern. H.D. commented that while positive, IRCARS/CIARS currently rest on unstable jurisprudential ground.<sup>294</sup> She, however, did not take issue with the reasoning in *Jackson* or *Morris*; instead, she expressed concern with the lack of judicial support since these decisions were rendered.

Indeed, and as mentioned above, there has been some judicial resistance to these decisions in Ontario.<sup>295</sup> This resistance does not seem to be as pronounced in Nova Scotia, where CIARs are routinely accepted in sentencing cases involving African Nova Scotian offenders. This willingness may be explained, in part, by the relative homogeneity of the Black Nova Scotian population. It is also accepted, despite not being a part of the national narrative, that the historic relationship between Canada and Black Nova Scotians was grounded in slavery, segregation and other forms anti-Black oppression.<sup>296</sup> The Black experience in Ontario may be slightly different. For instance, most of the Black inhabitants in Ontario are relatively new to

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<sup>292</sup> *Morris*, *supra* note 279. The appeal is scheduled to be heard after this thesis is submitted.

<sup>293</sup> C.S. is a clinical social worker and social work professor.

<sup>294</sup> H.D. is female defence lawyer who has used IRCARS in her own sentencing practice.

<sup>295</sup> See for eg. *R v Brissett and Francis*, *supra* note 279.

<sup>296</sup> Constance Backhouse, *supra* note 85; Royal Commission on the Donald Marshall, Jr., Prosecution (Nova Scotia: 1989).

Canada compared to their counterparts in Nova Scotia.<sup>297</sup> Thus, it is perhaps less cumbersome and controversial to establish a direct historical link between the State violence and current social problems facing Black Nova Scotians. There may, however, be some difficulty in establishing a causal link in the case of a recent Black immigrant.<sup>298</sup>

### **Section G: A Long Walk to Jackson**

In *Borde*, the Court of Appeal for Ontario was called upon to interpret, *inter alia*, the parameters of subsection 718.2(e) of the *Criminal Code*. Specifically, the appellant invited the court to consider whether the similarities in the plight of Indigenous peoples and Black Canadians warranted a similar methodological approach in the sentencing of both classes of offenders as enshrined in subsection 718.2(e) and as outlined in *Gladue*. The offender, Mr. Borde, was 18 years old at the time of the offence and 19 years old when he was sentenced. He plead guilty to aggravated assault, possession of a loaded restricted handgun, using a firearm in the commission of an indictable offence and breaching his recognizance. In sentencing Mr. Borde, the trial judge considered his lengthy youth record, which included entries for violent crimes and sentenced him to five years and two months' imprisonment. Mr. Borde appealed the sentencing decision.

On the appeal, Mr. Borde's lawyer, David Tanovich, applied to the court to admit fresh evidence to inform the court about the systemic and background factors experienced by Black males generally in Canada, and those in Toronto's Regent Park community specifically. The court declined to admit the fresh evidence about the systemic racism and background factors faced by Black males in Toronto. Moreover, the court reasoned that, despite the importance of

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<sup>297</sup> Diversity of the Black Population in Canada: An Overview (Statistics Canada: 2019) <<https://www150.statcan.gc.ca/n1/en/pub/89-657-x/89-657-x2019002-eng.pdf?st=J4GKAydG>>

<sup>298</sup> In some sense, ANS are similar to Aboriginals insofar as their longstanding mistreatment at the hands of the Canadian State.

these factors in determining a fit and just sentence for Black offenders, they would not affect the length of the sentence even if they were considered, given the seriousness of Mr. Borde's crime. The court, however, reduced Mr. Borde's sentence to four years and two months in light of his youth and also given that this was his first penitentiary sentence.

In *Hamilton*<sup>299</sup>, Justice Hill sitting in Brampton – a court that deals with a majority of the drug importation cases given its proximity to the Pearson International Airport – accepted the guilty plea of Ms. Hamilton, who admitted to swallowing 90 pellets of pure cocaine. She was consequently convicted of importing cocaine into Canada. Ms. Hamilton had no criminal antecedents. In considering a fit and just sentence, Justice Hill considered her race, gender and economic conditions. However, these issues were not raised by counsel. Justice Hill conducted his own research into the issue of race, gender, and poverty. He also took judicial notice of the fact that a disproportionate amount of the drug “mules” that came before him were poor Black mothers. He reasoned that the choices of these women were severely constrained by socio-economic factors that combined made these women particularly vulnerable to conscription by drug dealers to act as couriers. Thus, given society's complicity in the creation of these offenders' plight, it was befitting that society bore some of the blame by taking its share of the responsibility for the offenders' offences. Justice Hill sentenced Ms. Hamilton to a conditional sentence despite sentencing jurisprudence that required a lengthy penitentiary sentence, given the quantity and purity of the drugs imported into Canada by the offenders. The crown appealed the sentencing decision to the Ontario Court of Appeal.

The Court of Appeal, in a decision penned by Justice Doherty, held that Justice Hill assumed the combined role of advocate, witness and judge and thereby severely compromised

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<sup>299</sup>*R v Hamilton*, 2003 CanLII 2862 (ON SC).

the appearance of judicial impartiality.<sup>300</sup> Justice Doherty found that it was improper for Justice Hill to conduct his own research about issues related to the intersection between race, gender and poverty. This duty fell on counsel – not the trial judge. If the trial judge had concerns about these issues, then it should be raised with counsel who will determine whether those issues are germane to the case. It is improper for the trial judge to inject himself into the proceedings. The Court of Appeal concluded that the trial judge erred in sentencing the offenders to conditional sentences and reasoned that, where the offence is sufficiently serious, imprisonment will be the only reasonable response regardless of the ethnic or cultural background of the offender. Ms. Hamilton's sentence was altered to 20 months incarceration. However, the court determined that the ends of justice would be served by allowing her to complete her conditional sentence, as opposed to imprisonment for the few months that remained on her sentence.<sup>301</sup>

*Hamilton* was a watershed case insofar as it was one of the first appellate decision to consider how judicial perceptions of Blackness should inform sentencing outcomes. The sentencing judge determined that, given structural racism, the accused's level of moral blameworthiness was attenuated. Thus, he sentenced the accused to a conditional sentence even though the sentencing range for cocaine importation, particularly of that purity level, was a

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<sup>300</sup> *Hamilton*, *supra* note 42 at 33.

<sup>301</sup> In *R v Spencer*, 2004 CanLII 5550 (ON CA) the trial court judge applied Justice Hill's reasoning in his sentencing of Ms. Spencer. Ms. Spencer was found guilty of importing a large quantity of cocaine into Canada from Jamaica. The trial judge, relying on Justice Hill's decision in *Hamilton*, held that Ms. Spencer, a poor Black single mother, was the victim of systemic racism and gender discrimination which played a role in the commission of the crime. Taking these issues, *inter alia*, into account, the trial judge imposed a conditional sentence of two years less a day. The Crown appealed to the Court of Appeal for Ontario. This case was heard on the same day as *Hamilton* and was also penned by Justice Doherty. The court found that the trial judge erred in considering systemic racial and gender bias in determining an appropriate sentence. The court explained that the mitigating factors could not justify the sentence, given the seriousness of the offence. Furthermore, the trial judge had no evidence to suggest that Ms. Spencer was in dire financial straits. The court also found that it was improper for the trial judge to consider the collateral immigration consequences that Ms. Spencer would face if she was sentenced to term of imprisonment that exceed two years less a day. The court determined that a sentence of 40 months' incarceration would have been appropriate. After applying credit for the 16 months that was completed out of her conditional sentence, the court varied her sentence to 20 months' incarceration.

significant penitentiary sentence. As discussed above, the sentence was overturned on appeal, and the sentencing judge was sharply rebuked for his purported judicial activism. Following *Hamilton*, a small, but spirited, discussion emerged about the relationship between Blackness and the institution of criminal sentencing.<sup>302</sup> Richard F. Devlin and Matthew Sherrard argued that the decision would have a chilling effect on any subsequent cases dealing with social context evidence, particularly in cases involving Black offenders.<sup>303</sup> The authors predicted that other judges in similar cases would be unlikely to act on social context evidence. They asserted that *Hamilton* would serve to limit the use of social context in cases of systemic and intersectional inequality. The decision limits the judicial function (how judges should conduct themselves in court if there is concern about social context) in cases that require judges to consider the systemic and background factors of the offender. Moreover, the appeal court's criticism of the sentencing judge neglects the fact that the sentencing judge found the authority to raise social context from the *Constitution*, *Criminal Code*, and the common law.

According to the authors, the Court over-emphasizes the particularity of Aboriginal peoples and ignored the fact that other vulnerable communities also suffer from intersectional inequality. The authors agreed, however, that the sentencing judge presumed the generic applied to the specific. Moreover, he failed to establish a sufficient evidentiary link between the offender's race, gender, and class and the offence.<sup>304</sup> The authors' warning proved prophetic insofar as *Hamilton* did result in a chill on future cases raising social context evidence in cases

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<sup>302</sup>Daniel J. Song & Christine Boyle, "When Race Matters in Sentencing: *R. v. Ramsay* and *R. v. Hamilton*, 22 C.R. (6th) 86; Sonia N. Lawrence & Toni Williams, *supra* note 20; Carmela Murdocca, *supra* note 235; H. Archibald Kaiser, "Borde and Hamilton: Facing the Uncomfortable Truth About Inequality, Discrimination and General Deterrence" (2003) 8 C.R. (6th) 289; Michael Plaxton, "Nagging Doubts About the Use of Race (and Racism) in Sentencing" (2003) 8 C.R. (6th) 299; Jennifer J. Llewellyn, Restorative Justice in *Borde* and *Hamilton* — A Systemic Problem? (2003) 8 C.R. (6th) 308; David M. Tanovich, *supra* note 20; Richard F. Devlin & Matthew Sherrard, "The Big Chill?: Contextual Judgment after *R. v. Hamilton* and *Mason*" (2005) 28 Dalhousie L.J. 409.

<sup>303</sup> Richard F. Devlin & Matthew Sherrard, *supra* note 299.

<sup>304</sup>See generally, *ibid.*

where these systemic and background factors were germane in the determination of an appropriate sentence.<sup>305</sup> However, the wounds from the past are still raw and visible. In some regard, we have not experienced a full thaw. To date, only a few cases have considered Blackness in the sentencing context. A detailed analysis of some of these cases will be provided below. Unlike *Hamilton*, this new generation of cases aims to avoid the pitfalls of their predecessors. For example, painstaking detail is placed on providing an evidentiary nexus between the condition of Blackness and the offence and the offender's personal responsibility. Defence lawyers deploy CIARs/IRCARs as a means of providing an evidence-based assessment of blameworthiness. It is arguable that defence lawyers have travelled a long distance from *Hamilton*.

#### **Section H: Doctrinal Review (Nova Scotian Cases)**

*R v "X"* is the first case to use a CIAR. In that case, X, a sixteen (16) year old Black youth shot his fifteen (15) year old cousin in the stomach with a hunting rifle in an attempt to kill him. He was convicted of attempted murder. The Crown applied to have X sentenced as an adult. Defence counsel argued that X should be sentenced as a young person pursuant to subsection 42(2) (o) of the *Youth Criminal Justice Act*.<sup>306</sup> Defence counsel also invited the court to consider X's race and culture in determining the appropriate sentence. This is not the first case where a court had been invited to consider the impact of race and culture in the sentencing of Black offenders.<sup>307</sup> It was, however, the first time that a Canadian court was invited to consider race and culture in the context of a Black youth offender in determining the appropriateness of imposing an adult sentence. Defence counsel applied to have Mr. Robert Wright, a registered social

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<sup>305</sup> A review of the reported sentencing cases revealed that it was not until 2014 in Nova Scotia and 2018 in Ontario that Lawyers began to raise the social and cultural context of their Black clients in sentencing hearings.

<sup>306</sup> *Youth Criminal Justice Act*, SC 2002, c 1. ("YCJA")

<sup>307</sup> *Hamilton*, *supra* note 42.



worker, qualified as an expert on race and culture. Following a lengthy voir dire, Judge Anne S. Derrick (as she then was) qualified Mr. Wright as an expert and permitted him to provide expert testimony about race and culture, specifically how these factors impacted on X's life. Judge Derrick found that Mr. Wright's testimony and report provided her with:

a more textured, multi-dimensional framework for understanding X, his background and his behaviours. "X" has been both a perpetrator and a victim of violence in the context of his criminally-impacted community. Mr. Wright's evidence gives me a lens through which to view "X" in determining this application. And it suggests that "X"'s character and maturity are still in a formative stage. Mr. Wright encountered a significantly conflicted young person, still located in his loving, pro-social family, who is struggling with his identity in the context of a criminally-impacted community that has incubated mistrust, rivalries, and violence.<sup>308</sup>

Judge Derrick rejected the Crown's application and sentenced X to a youth sentence pursuant to the applicable subsection of the *YCJA*. She emphasized X's "immaturity, heightened vulnerability and reduced capacity for moral judgement."<sup>309</sup> She also reasoned that an adult sentence would derail X's life and "undermine the potential for him to change."<sup>310</sup> Judge Derrick also canvassed some of the work done by the Correctional Investigator on the status of racialized offenders in the Federal prison system. She found that the Federal system did not provide adequate opportunities for racialized offenders to participate in culturally relevant programming.<sup>311</sup> This was an essential feature of X's rehabilitative plan that could not be facilitated in the Federal system. These programs, however, were available in the youth correction institution in Nova Scotia.<sup>312</sup> Judge Derrick ultimately sentenced X to a three (3) year Custody and Supervision Order (CSO).

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<sup>308</sup> *R v "X"*, *supra* note 41 at 198.

<sup>309</sup> *Ibid* at 265.

<sup>310</sup> *Ibid* at 252.

<sup>311</sup> *Ibid* at 256-259.

<sup>312</sup> See also In *J.C. (Re)*, 2017 NSPC 14 (CanLII) the provincial director made an Application to transfer the offender to adult facility to finish his youth sentence. Defence counsel argued that no culturally appropriate or relevant programming existed in the adult facility. The defence relied on the evidence of race and culture expert. Her

In the sentencing cases of *R v E. S.*<sup>313</sup>, *R v R.D.*<sup>314</sup> and *R v D.B.*<sup>315</sup>, the three-youth co-accused pleaded guilty to an armed home invasion robbery, which resulted in three young people being shot. One of the victims was rendered a quadriplegic. Interestingly, R.D. was X's victim. He was shot by X a year and a half before he participated in the armed home invasion robbery. The Crown did not seek an adult sentence given that none of the co-accused was the shooter and their respective degrees of participation. In each case Judge Derrick was invited to consider the Blackness and Indigeneity of the co-accused. Each of the co-accused, while being raised in Black communities and families, claimed Aboriginal heritage. *Gladue* reports were ordered in each case. However, the reports were unable to conclude with certainty the authenticity of R.D. and D.B.'s claim of Aboriginal heritage. Judge Derrick was also invited to consider the co-accused Blackness. Her Honour held as she did in *R v X*, that race and culture are relevant considerations in sentencing. Each of the co-accused benefited from the presumption of diminished culpability by virtue of their youth. The systemic and background factors that have affected the lives of the co-accused does not diminish their level of accountability. Judge Derrick explained that "the emphasis on accountability is not diminished by considerations of D.(R.)'s experience as a racialized youth drawn into the orbit of criminally-inclined peers. It is informed by this reality".<sup>316</sup> She further explained that R.D.'s:

moral culpability and his rehabilitation and reintegration must be examined through the lens of his racialization and his experiences as a member of a community where criminal activity has been, to some extent, normalized for him. The normalization of criminal activity and association was heightened by D.(R.)'s experience as a victim of violence in his community.<sup>317</sup>

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honour, Judge Derrick (as she then was) said it was in the public's interest to grant the Director's Application to have the offender transferred to adult facility to his finish youth sentence.

<sup>313</sup> 2015 NSPC 81 (CanLII).

<sup>314</sup> 2015 NSPC 83 (CanLII).

<sup>315</sup> 2015 NSPC 82 (CanLII).

<sup>316</sup> 2015 NSPC 83 (CanLII) at 97.

<sup>317</sup> 2015 NSPC 83 (CanLII) at 95; see also 2015 NSPC 82 (CanLII) at 101; 2015 NSPC 81 (CanLII) at 117.

Judge Derrick sentenced R.D. to 260 days CSO and 12 months' probation. She sentenced both co-accused to 267 days CSO and 12 months' probation.

In *R v N.W.*<sup>318</sup> the youth offender was tried and convicted of first-degree murder in the shooting death of another young person. N.W. was seventeen years old at the time of the murder. The Crown applied to have N.W. sentenced as an adult. Similar to the reasoning in *X*, Judge Buckle held that “young people are entitled to a presumption of diminished moral blameworthiness because of their age, which results in a heightened vulnerability, less maturity, and reduced capacity for moral judgment.”<sup>319</sup> She further added that “evidence of race and culture was relevant to the determination of whether the presumption of diminished moral blameworthiness or culpability had been rebutted.”<sup>320</sup> However, Judge Buckle held that “concluding that race and culture are relevant doesn't answer the question of how to use that information in deciding whether to impose an adult sentence.”<sup>321</sup> She questioned whether this information should arbitrarily diminish a Black offender's moral culpability. Her honour relied on Justice Lebel's reasoning on this subject, albeit made in the context of indigeneity, and held that an offender's “moral culpability is potentially diminished because of the “constrained circumstances” which they may have found themselves in because of the operation of systemic and background factors that are connected to their race and cultural background”.<sup>322</sup> She ultimately dismissed the Crown's application and sentenced N.W. to a youth sentence.

The above cases dealt with youth offenders, who not only benefit from the presumption of diminished moral blameworthiness but are also sentenced differently than their similarly

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<sup>318</sup> 2018 NSPC 14.

<sup>319</sup> 2018 NSPC 14 at 18.

<sup>320</sup> 2018 NSPC 14 at 28.

<sup>321</sup> 2018 NSPC 14 at 33.

<sup>322</sup> 2018 NSPC 14 at 35.

situated adult counterparts. The case of *R v. Gabriel*<sup>323</sup> involved an adult offender. The facts of the case are eerily similar to the youth cases discussed above and those that will follow. The offender, Kale Gabriel, was convicted of second-degree murder by a jury in the shooting death of his cousin, Ryan White. He was 22 years old when he killed Ryan. Pursuant to section 235 of the *Criminal Code* he was sentenced to imprisonment for life. The only issue that remained to be determined by the court was the period of parole ineligibility.<sup>324</sup> Defence counsel asked the court to consider both a CIAR and *Gladue* report given Kyle's mixed Black and Aboriginal heritage.<sup>325</sup> Justice Campbell explained that:

Aboriginal offenders are treated differently. The Cultural Assessment in this case does not have the same constitutional implications as a *Gladue* report. But that doesn't mean it isn't vitally important. It is a historical fact and present reality that African Nova Scotians were and continue to be discriminated against. As the criminal justice system must take into account the overrepresentation of Aboriginal people in custody, it must also take into account the effects of discrimination on members of the African Nova Scotian community.<sup>326</sup>

He further added that the CIAR, similar to a *Gladue* report, “does not provide a justification for a lighter sentence. Like a *Gladue* report it might prompt the consideration of restorative justice options where those are appropriate. It doesn't position the offender as helpless victim of historical circumstances.”<sup>327</sup> After a review of the applicable case law, Justice Campbell set the period of parole ineligibility at thirteen (13) years.

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<sup>323</sup> 2017 NSSC 90 (CanLII) (“*Gabriel*”). See also *R v Riley*, 2019 NSSC 92. Here, the offender was convicted of 2<sup>nd</sup> degree murder and was sentenced to life imprisonment. The only issue for determination was his period of parole ineligibility. Defence counsel submitted an IRCA report. The court found it helpful in outlining the offender's complicated background. Ultimately, the court found that a period of 15 years parole ineligibility was appropriate.

<sup>324</sup> *Criminal Code*, RSC 1985, c C-46 at section 745.

<sup>325</sup> See also *R v Perry* 2018 NSSC 16, where the mixed race (Aboriginal and Black) offender pleaded guilty to a number of weapon offences. Defence filed both an IRCA and *Gladue* Reports. The court found that rehabilitation was the key objective of sentence given the offender's Indigenous (para 76). The court relied heavily on Mr. Perry's indigenous ancestry given the specific references in the code and the case law. He was sentenced to time served and house arrest.

<sup>326</sup> 2017 NSSC 90 (CanLII) at para 49.

<sup>327</sup> 2017 NSSC 90 (CanLII) at 90.

In *R v Downey* the offender, Devon Downey, pled guilty to manslaughter for punching the victim, Kaylin Diggs rendering him unconscious, which caused Kaylin to fall and fatally hit his head on the ground. Devon, who was 25 years old at the time of the offence, had no criminal record and was leading a pro-social life. He was not a good student but only managed to complete grade 11. However, Devon benefitted from having community mentors and a stable home life. He is also the father of two young children. The fight that led to the death of Kaylin began as brawl in the downtown entertainment district. Kaylin was not the aggressor. He intervened to assist his friend and was punched by Devon and hit the ground and died. Defence counsel asked the court to consider Devon's race and culture in determining an appropriate sentence. In the CIAR, the writer discussed the cultural code of young Black men in Halifax. This cultural code involved "resolving social injustice by not leaving, backing down or being punked out, being unconsciously hyper-vigilant to potential conflicts."<sup>328</sup> Justice Rosinski held that:

in the circumstances of this case, there was no social injustice trigger; no racial or discriminatory [black versus white] trigger evident; no realistic need to be hyper-vigilant, given that I have concluded that Mr. Downey was in the company Michael Chisholm who was fighting Cody Good, surrounded by 8 to 10 of their friends, when Mr. Diggs, an African-Nova Scotian male of similar age, arrived at the fight to assess his friend Cody Good's situation. None of the foregoing factors could realistically be said to play any role in Mr. Downey's striking Mr. Diggs.<sup>329</sup>

The Crown argued for a seven (7) year prison sentence. While the defence argued for a sentence of two (2) to three (3) year sentence. Justice Rosinski sentenced Devon to four (4) years imprisonment. However, he endorsed the warrant of committal to ensure that Correctional Services Canada considered Devon for "psychotherapy and psycho-educational programming; as

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<sup>328</sup> 2017 NSSC 302 at 8.

<sup>329</sup> 2017 NSSC 302 at 10.

well as programming regarding Mr. Downey's mental health, particularly by assessors who are sensitive to his cultural and racial background as an African-Nova Scotian.”<sup>330</sup>

### **Section I: Doctrinal Review (Ontario Cases)**

As discussed above, scholars warned of the impact that *Hamilton* would have on the adducing of social context evidence in sentencing. The prediction proved to be accurate, given that lawyers have only recently begun to raise in sentencing hearings the social and cultural context of their Black clients. Unlike Nova Scotia, IRCARs have not been widely used in Ontario. Of the reported cases, only three (3) decisions benefitted from the use of an IRCAR.<sup>331</sup> The other cases, except for *R v Reid*, referred to or relied on, *Jackson*<sup>332</sup>, which was the first case in Ontario to consider an IRCA report.

In *Jackson*, Justice Nakatsuru, focused on the accused, Jamaal Jackson's, Blackness, and how that fact should inform his sentence. Justice Nakatsuru began his judgement by acknowledging that African Canadians are overrepresented in jails and decided to use the opportunity to make “small step in changing that.”<sup>333</sup> He did warn, however, that sentencing is an individualized process that is designed to achieve proportionality. Jamaal is of mixed Black and Aboriginal heritage. However, he identifies as being Black. He is originally from Nova Scotia. At the time of sentencing hearing he was 33 years old. Jamaal has a lengthy criminal record. The police intercepted communication between Jamaal and another person making arrangements to purchase a firearm. A warrant was sought and authorized. The Police went to Jamaal's home and searched him incident to arrest and discovered a gun with one bullet in the chamber. At the time,

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<sup>330</sup> 2017 NSSC 203 at 34. See also *R v Boutilier* where the offender was sentenced to 7.5 years imprisonment for vehicular homicide. The defence relied on both an IRCA and Gladue reports on account of Mr. Boutilier mixed heritage. The court at para 59 held that the offender “shall be afforded the counselling and other therapeutic remedies recommended by the authors of the Gladue and IRCA reports as available while in custody”.

<sup>331</sup> *Jackson*, *supra* note 42; *Morris*, *supra* note 279; *R v T.J.T.*, 2018 ONSC 5280

<sup>332</sup> *Jackson*, *ibid.*

<sup>333</sup> *Ibid* at 2 and 4.

Jamaal was subject to five weapons prohibitions. He pled guilty to the offences. Justice Nakatsuru relied on both the IRCA report and his own judicial notice of systemic racism and other factors that plague African Canadians.<sup>334</sup> The crown sought an 8.5-10-year sentence, while the defence sought a 4-year sentence. He was sentenced to 6 years imprisonment.

In *Jackson*, Justice Nakatsuru provided a framework for sentencing Black offenders in Ontario.<sup>335</sup> He rejected the defence's invitation to formulate a sentencing methodology similar to the one used for Indigenous offenders. Instead, he grounded his methodology in the sentencing principles already enshrined in the *Criminal Code*. Moreover, he also rejected the notion that expert evidence is mandatory, whether in the form of an IRCA report or *viva voce* evidence from a 'race and culture' expert. The court found that judicial notice of the conditions facing Black people across Canada and how those conditions may impact the offender before the court is sufficient. However, it was held that the accused need not establish a direct link between anti-Black racism/background factors and the crime.<sup>336</sup> Justice Lemay rejected this holding in *R v Brissett and Francis*. In that case, the court found that the ruling in *Hamilton* required some direct link between the social deprivation and the crime or the offender.<sup>337</sup> In *R v Williams*, Justice Hill explained that the:

court's dicta in *Hamilton* is best understood to mean that the record before the court ought to raise this issue from the general to the specific in the sense of some evidence, direct or

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<sup>334</sup> *Jackson, ibid* at 82: Nakatsuru J. stated: I find that for African Canadians, the time has come where I as a sentencing judge must take judicial notice of such matters as the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, intergenerational trauma, and racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration. See *R v Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at 48-49; *R v Sutherland*, 2016 ONCA 674, 342 C.C.C. (3d) 309 at 35; Alan W. Bryant, Michelle Fuerst & Sidney N. Lederman, *The Law of Evidence in Canada*, 5<sup>th</sup> ed. (Toronto: LexisNexis Canada, 2018), at p. 1393.

<sup>335</sup> See also *Morris*, *supra* note 279.

<sup>336</sup> *Jackson*, *supra* note 42 at 111.

<sup>337</sup> *R v Brissett and Francis*, *supra* note 279 at 69.

inferential, that racial disadvantage is linked to constraint of a particular offender's choices and to his life experience in bringing him before the court.<sup>338</sup>

In *Morris*, Nakatsuru J., relying largely on his analysis in *Jackson*, sentenced the accused to a 15-month sentence for gun possession. That sentence was lowered to 12 months after the judge found that the police breached the accused's *Charter* rights during his arrest when the police officer drove the police car over the accused's foot. Like *Jackson*, the court took judicial notice of systemic anti-Black racism and relied heavily on the IRCA report filed by the accused. The court found that the impact of systemic anti-Black racism on the accused should mitigate the sentence imposed. He also characterized the sentenced as "lenient" and added that some people might consider the accused as an unworthy candidate for such a low sentence. The judge commented that the accused's decision to pick up a gun was a consequence of oppression, despair and disadvantage.<sup>339</sup>

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<sup>338</sup> *R v Williams*, 2018 ONSC 5409 (CanLII) at para 45; See also *Hamilton*, *Supra* note 42 at para. 133; *R v Brissett and Francis*, *supra* note 279 at 60-62; *R v Nimaga*, 2018 ONCJ 795, 151 W.C.B. (2d) 247, at 45; *R v Peazer*, [2003] O.J. No. 6283 (Ont. S.C.J.), at 56-59; *R v Downey*, 2017 NSSC 302, 143 W.C.B. (2d) 416, at 10; see however, the opposite result in the context of Aboriginal offenders (*R v F.H.L.*, 2018 ONCA 83, 360 C.C.C. (3d) 189 at 40-42);

<sup>339</sup> *Morris*, *supra* note 279 at 83-84.



## **Chapter Four: Mobilizing Blackness During Sentencing**

### **Section A: The Paradox of Visibility**

In all the cases reviewed above, the offenders sought to have the sentencing judge focus on their Blackness. Some legal scholars, particularly Tanovich, hypothesize that anti-Blackness in the criminal justice system can be remedied by increasing the visibility of Blackness/race.<sup>340</sup> It is posited that the erasure of race perpetuates racism by blocking opportunities for meaningful engagement with race-based claims. There is, perhaps, cogent reasons to suggest that by highlighting race, judges will be provided with a fulsome understanding of the salient issues in dispute. Indeed, race talk may encourage a judge to grapple with issues that are often deemed taboo, or within the province of social scientists and legislators. It may also inspire judicial examination of identity and, perhaps more importantly, a reckoning of how a particular judge has previously analyzed race. Judges are not immune to common suppositions about race, culture and belonging.<sup>341</sup> A judicial appointment does not automatically ‘wipe’ entrenched notions, attitudes and behaviours. Such an expectation would be unreasonable and naive. What is instead required is adherence to and respect for the law and prevailing standards of decency. However, like laypeople, judges may, at times, whether consciously or unconsciously access and rely on entrenched suppositions.<sup>342</sup> This kind of autonomic thinking is rampant in the policing of Black bodies.<sup>343</sup>

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<sup>340</sup> David M. Tanovich, *supra* note 131; David M Tanovich, “The *Charter* of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System”, *supra* note 5; David M. Tanovich, “Constitutional Cases 2007 Ignoring the Golden Principle of *Charter* Interpretation?” (2008), 42 SCLR (2d) 441; David M Tanovich, *supra* note 171; David M. Tanovich, *supra* note 40; Julie Jai & Joseph Cheng, *supra* note 40.

<sup>341</sup> *R v S. (R.D.)*, [1997] 3 SCR 484, 1997 CanLII 324 (SCC).

<sup>342</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 4 at Chapter 8.

<sup>343</sup> *Paying the Price*, *supra* note 4; *A Collective Impact*, *supra* note 3; *Report of the Independent Street Checks Review* (Toronto: Queen’s Printer for Ontario, 2018); David M. Tanovich, “The Colour of Justice: Policing Race in Canada”, *supra* note 4

In the case of judges, it may be challenging to detect whether racism motivated their decision. While judges are held to a high standard of fairness, it is unreasonable to believe that they are not similarly laden with pernicious racial presuppositions. It is, however, impermissible for them to rely on these suppositions in their decision-making. In order to avoid claims of bias, Judges must strive for impartiality and aim to disabuse themselves of such notions. It is questionable whether judges are capable of thoroughly disabusing themselves of these suppositions. Is it possible, however, that a bombardment of race talk may inadvertently trigger a judge's deeply held preconceived notions about Blackness? One may argue that these beliefs and experiences may provide a lens through which a judge can analyze a problematic issue. The problem arises, however, when these experiences, and beliefs are given precedence over the evidence tendered by the parties to the dispute, or if they lead to a reasonable apprehension of bias.

In *Hamilton*, Justice Hill, frustrated with the conspicuous efforts of lawyers to silence the issue of race, class and gender in drug importation cases, decided to raise the issue himself. Not only did he take judicial notice of this phenomenon, he also conducted extensive research and adduced his findings into evidence. *Hamilton* provides an excellent example of a judicial over-correction of the over-punishment of Black female bodies.<sup>344</sup> Justice Hill endeavoured sought to increase the visibility of a phenomenon that he considered to be a severe problem in Black communities. He essentially turned Ms. Hamilton's sentencing hearing into platform from where race talk, particularly around race, gender and class, could take flight. As noted above, this decision was met with swift rebuke from the Court of Appeal. Justice Hill may be credited, however, for highlighting a grave issue in some Black communities, namely drug trafficking,

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<sup>344</sup>Sonia N Lawrence & Toni Williams, *supra* note 20; Julia Sudbury, *supra* note 8.

and, more importantly, the state's response to it.<sup>345</sup> However, his laudable approach may have had unintentional consequences insofar as it may have reinforced stereotypes around Blackness and the drug trade. A similar argument can be made about the reported CIARs/IRCARS cases in that they primarily mobilize race in situations involving serious gun and drug violence. To date, there are no reported IRCAR/CIAR cases that mobilize race in the context of a less serious crime. Admittedly, it would be deemed unreasonable to presuppose that Blackness is not an essential factor in sentencing cases involving theft, impaired driving, or other offences not typically associated with Black people. It is disturbing that Blackness is primarily being raised in the context of serious and violent crimes where both the victim and the offender are Black Canadians.

Moreover, because Blackness is stereotypically associated with gun and drug crimes, defence lawyers must be careful that this association does not inadvertently get reinforced through a practice of using CIARs/IRCARS in primarily gun and drug cases. In these cases, judges are provided with a biographical sketch of the offender's journey through Blackness. Defence lawyers invite judges to draw connections between the offender's journey and his unfortunate destination. These reports are deployed as a means of connecting the offender's Blackness and the offence, which is done in order to conduct a better assessment of moral blameworthiness. In some sense, Blackness is coopted and used as a yardstick to measure blame. The more egregious the Black experience, the less morally blameworthy is the offender for his crime. Therefore, formulating a wretched Black experience may be instrumental in securing a positive sentencing outcome. This approach may require an offender to perform a certain *type* of

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<sup>345</sup> Akwatu Khenti, *supra* note 20 at 190; David M. Tanovich, *supra* note 20.

Blackness. One that is tragic and pathological but may increase the chances of diminishing moral blameworthiness.

Consequently, the most wretched embodiment of Blackness is put on display in order to evoke a particular emotive response from a sentencing judge. The more pitiful the narrative, the higher the probability of a favourable outcome. Thus, all attempts at erasing race are countered by over-emphasizing the salience of race. The Blackness of the offender must become undeniably visible, which will presumably force judicial engagement. It is unclear, however, that increased judicial engagement with race will reduce the over-incarceration of Black Canadians. Indeed, as it is colloquially stated: *talk may be cheap*. Without concrete action, for example, judicial willingness to incorporate, as Steiker puts it, robust mercy, as a countervailing method of correcting the impulse to over-punish, visibility may be rendered hollow.<sup>346</sup> In some sense, performing Blackness as a means of mitigating punishment involves self-degradation.<sup>347</sup> However, it is controversial if mercy and justice can co-exist in a retributive sentencing paradigm.<sup>348</sup> Perhaps even more controversial is whether mercy and Blackness can co-exist.

It is unclear whether the goal of CIARs/IRCARS is to generate proportionate sentences or disproportionately low sentences that promote countervailing goals. Put another way, can IRCARS/CIARs be construed as a plea for mercy? Moreover, if so, is this a dignifying aim given that some Black offenders desire colour-blind treatment by sentencing judges. One might even argue that the whole purpose of CIARs/IRCARS is to ask judges to focus on the colour of the accused's skin so that they will focus on the content of the accused's character. This approach is

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<sup>346</sup> Carol Steiker, "The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System", *supra* note 222; Carol Steiker, "Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration" *supra* note 226.

<sup>347</sup> James Q. Whitman, *supra* note 183 at 32-39.

<sup>348</sup> R A Duff, *supra* note 230. A more fulsome treatment of mercy is provided below. For now, it is important to discuss how Blackness can be harnessed to reduce blameworthiness.

challenging, and maybe even paradoxical manoeuvre – but it may also be a logical one, insofar as we are operating within the cruel illogic of white supremacy.<sup>349</sup>

In a proportionality-based sentencing regime, punishment is allocated in correspondence with desert/blame.<sup>350</sup> Thus, any attempts at sentence mitigation must demonstrate how the offender's degree of blame can be attenuated. Given the supposed pathologies associated with Blackness, the offender's race may provide the perfect scapegoat. It is not the offender, *per se*, that deserves blame – but rather his Blackness. He, therefore, cannot be held solely responsible for his conduct, because but for his miserable experiences, he would not have chosen that particular path. In other words, his choices were constrained by a society infected with anti-Black racism. Thus, society deserves some, if not most, of the blame. It follows that a proportionate sentence must apportion blame in a fashion that compensates the offender for the structural violence levelled against him. A Black offender embodies the status of both victim and offender.<sup>351</sup> Therefore, he must not be made to pay for conduct that was the inexorable result of his attempts at surviving a structurally racist society. This supposition poses a problem, however, namely: how does one measure the amount of the offender's conduct that was motivated by free-will and the amount that was the consequence of structural violence? There is no accepted scientific method used in criminal sentencing to parse blame.<sup>352</sup> The proportionality analysis is

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<sup>349</sup> David M Tanovich, "The *Charter* of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System", *supra* note 5; Elizabeth Sheehy, "Equality and Supreme Court Criminal Jurisprudence: Never the Twain Shall Meet" (2010) 50 SCLR (2d) 329 at 29 (LexisNexis); Carmela Murdocca, *supra* note 23; Robyn Maynard, *supra* note 12; Sherene Razack, *Looking white people in the eye: gender, race, and culture in courtrooms and classrooms* (Toronto: University of Toronto Press, 1998).

<sup>350</sup> Mirko Bagaric, "Proportionality in Sentencing: Its Justification, Meaning and Role" (2000)12:2 Current Issues Crim. Just. 143.

<sup>351</sup> Wesley Crichlow, *supra* note 188;

Scot Wortley, *supra* note 139; See generally Paul Butler, *supra* note 50; Raff Donelson, *supra* note 134; Tommie Shelby, *supra* note 134.

<sup>352</sup> This statement does not suggest that scientific reports or evidence used to assist judges understand the entire context of the situation and the offender is not a tool for assessing moral blameworthiness. What I am arguing,

relied upon to perform that function. There are two points on the proportionality scale – seriousness of the offence and the offender’s level of moral blameworthiness. With regard to the former, as highlighted above, many of the IRCAR/CIAR cases involved serious and violent offences. Thus, it is the latter point of the scale that is often in contention.

Human beings are the product of many competing and incongruent forces. Therefore, there is serious doubt around the feasibility of a linear theory of criminality.<sup>353</sup> Unfortunately, Blackness is often unfairly proffered as an arrow to criminality. While there exist, no scientific studies evincing such a connection, there is nonetheless a prevailing pseudo-scientific notion that Black bodies are prone to criminality. Proponents of IRCARs/CIARs may run the risk of reinforcing this belief when Blackness is routinely offered as an excuse or an explanation for an offender’s conduct. Such an approach sacrifices Blackness for sentencing expediency. The concern is that a particular type of Blackness: one that is tragic and pathological - is provided as the lens through which to analyze an offender’s conduct. There are cogent reasons to suggest that this approach may actually reinforce already entrenched notions of Black criminality. Many of the ex-offenders interviewed for this project were opposed to the idea of offering race as an explanation for their conduct. One ex-offender interviewee remarked that “*if I did the crime, then my race shouldn’t matter.*”<sup>354</sup> Many of the ex-offenders desired to be treated similar to white offenders. It appeared that whiteness in their eyes was a barometer for fair treatment. In some sense, they desired to have their race remain neutral – invisible.<sup>355</sup> This quest for invisibility,

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however, is that there is no independent apparatus, for example a risk tool, which is used in some States in the United States, to parse blame in a mechanical or computerized fashion.

<sup>353</sup>See generally Lee E. Ross, “A Vision of Race, Crime and Justice Through the Lens of Critical Race Theory” in Eugene McLaughlin & Tim Newburn, *SAGE Handbook of Criminological Theory*, ed, (SAGE Publications Ltd, 2010) 391.

<sup>354</sup> M.W. is a 38-year-old Black male. This is direct quote.

<sup>355</sup> For another account on visibility, See generally Ralph Ellison, *Invisible Man*, (New York: Random house, 1947). In this book, Ellison equates invisibility with race, and specifically Blackness, in the sense that everything

however, may be futile. It is also problematic to imagine that equality may only be achieved when race is rendered invisible. This is the paradox confronting critical race lawyers and scholars, namely: when is it appropriate or desirable to make race visible? In the eyes of the ex-offenders, the answer is obvious – they did not see value in making their race visible. Indeed, they perceived their race as being an obstacle to fair treatment. The ex-offenders expressed a concern that Franz Fanon aptly explained in his book, *Black Skin White Masks*:

and already I am being dissected under white eyes, the only real eyes. I am fixed. Having adjusted their microtomes, they objectively cut away slices of my reality. I am laid bare. I feel, I see in those white faces that it is not a new man who has come in, but a new kind of man, a new genus. Why, it's a Negro!  
I slip into corners, I remain silent, I strive for anonymity, for invisibility. Look, I will accept the lot, as long as no one notices me.  
My blackness was there, dark and unarguable. And it tormented me, pursued me, disturbed me, angered me. Negroes are savages, brutes, illiterates.<sup>356</sup>

Fanon's explication of Blackness lends support to the ex-offenders' apprehensions around race visibility. It can be traumatic for some offenders to witness and participate in, the magnification of their Blackness in a courtroom setting, where they are already viscerally aware of their Blackness, and of the fact that Blackness typically operates against people's favour in our courts and society.<sup>357</sup> Blackness is always present. It, however, becomes more prominent in the sight of whiteness. In those moments, Blackness is transformed – mutated into something, that despite being unrecognizable to most Black Canadians, nonetheless demands recognition. The Black body becomes of a site of constant reconfiguration in both meaning and identity. It is contorted at a whim to ever-changing demands on Black identity. Indeed, to exist in Black skin is a

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about his individuality and character is obscured and rendered invisible by virtue of his skin. He writes, "I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves or figments of their imagination, indeed, everything and anything except me." On this reading, Black people who want to be treated as white do not want to be invisible; they want to be visible in the way that white people are – as persons in our society who are seen as individuals, and not as cyphers or placeholders onto which we project a standardized set of characteristics.

<sup>356</sup>Frantz Fanon, *Black Skin, White Masks*, (London: Pluto Press, 1952) at 116-117.

<sup>357</sup>Sherene Razack, *supra* note 346.

continuous struggle between the desire for free expression and predestination. As Fanon explains:

when the black man, who has never felt as much a "Negro" as he has under white domination, decides to prove his culture and act as a cultivated person, he realizes that history imposes on him a terrain already mapped out, that history sets him along a very precise path and that he is expected to demonstrate the existence of a "Negro" culture.<sup>358</sup>

What Fanon describes can only be understood as an affront to the dignity and free will of Black peoples. Black Canadians' free will is constrained through the mechanism of anti-Black racism and other forms of structural violence. They inhabit foreign bodies that are not of their creation. Black bodies are, in one sense, alien but have nevertheless managed to replace and suppress the Black aesthetic of another time, or that exist in the minds and souls of Black peoples. This constructed "Blackness" provides the only visible, tangible representation of Blackness. What resides inside the mind and soul of Black peoples is deemed fictional or worse, valueless, which may lend support for the ex-offenders' reluctance to engage with their Blackness during sentencing. The Blackness on display is not their own, but despite its origins, they are viscerally aware that it is this image of Blackness that has been engrafted on them. It is now their burden to bear.

W.E.B Du Bois posited that Black people embody a sort of double-consciousness. He remarked that:

after the Egyptian and Indian, the Greek and Roman, the Teuton and Mongolian, the Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world, -- a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness, -- an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.<sup>359</sup>

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<sup>358</sup>Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1961) at 150.

<sup>359</sup>W.E.B. Du Bois, *The Souls of Black Folk* (Chicago: Dover Publications, 1903) at 2.



Du Bois exposition of double-consciousness is as accurate today as it was when he wrote it. Black offenders who come before white sentencing judges must attend to both these realities. Their self-perception is arguably given value through the eyes of another. Therefore, it may be prudent to obscure the gaze of the judge by focusing the judge's attention away from Blackness.<sup>360</sup> IRCARs/CIARs do the opposite. They purposely place Blackness in the judge's direct line of sight to encourage him or her to examine issues of identity and race and their relevance in criminal sentencing. This approach is not without risk. As Razack argues:

unlikely to acknowledge their oppressive practices, dominant groups merely deny that such practices exist. To insist on being seen, that is, to contest the dominant group's perception is - for an oppressed person -to be smashed in the process by a wall of denial that makes of one's existence an illusion, an imagined story of unfairness and injustice.<sup>361</sup>

Indeed, there exists a sort of paradox inherent within the visibility-invisibility dichotomy. To desire acknowledgement is to risk denial, derision and unfair treatment, whereas invisibility serves to perpetuate injustice. Proponents of sentencing reform via IRCARs/CIARs presuppose that the principle of judicial impartiality will provide a shield against the sting of anti-Blackness. One lawyer interviewed for this project stated that "lawyers have this blind faith in the system. The offenders have no faith in the system. They must feel that their Blackness put them in this situation then why would they want to highlight it."<sup>362</sup> Her opinion seems to align with the offenders' perception around introducing race in sentencing. It is unclear if defence lawyers are aware of this reluctance. One defence lawyer even remarked that *he must work a lot harder for his Black clients; therefore, he welcomes any tool that will make this job easier.*<sup>363</sup> It is questionably if IRCARs/CIARs can make the job of defence lawyers easier. Put another way,

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<sup>360</sup> Sherene Razack, *supra* note 346 at 24.

<sup>361</sup> *Ibid.*

<sup>362</sup> J.T. is a white female lawyer. This is a direct quote.

<sup>363</sup> G.C. is a Black male defence lawyer.

does emphasizing race serve to make race-based litigation or sentencing easier or fairer? There is reason to suspect that an inordinate amount of attention on race may ‘back-fire’ and produce unanticipated results. Does this mean, however, that race should be sidelined in sentencing hearings given the inherent risks associated with its mobilization? This question will be discussed in more detail below. However, suffice it to say, if race is mobilized at sentencing, then it should be done in a principled fashion in light of this approach’s pitfalls and promises. When race is coopted as a convenient way to explain a phenomenon, or proffered as the sole unit for legal analysis, we risk essentializing the Black experience. These same questions and issues play out when lawyers consider spotlighting race in the context of *Charter* challenges.

### **Section B: The Paradox of Invisibility (Race and the *Charter*)**

The paradox of visibility has played out in other contexts, apart from sentencing – most notably in the framing of *Charter* challenges.<sup>364</sup> Defence lawyers rarely mobilize race in cases dealing with anti-Black policing.<sup>365</sup> This approach is problematic because a failure to cite race and anti-Black bias during the guilt phase, including via *Charter* challenges and in evidence voir dires, leaves anti-Black racism to be dealt with on the back end.<sup>366</sup> It is widely accepted that the overcriminalization of Black Canadians leads to disparity in Black incarceration rates. Despite this recognition, anti-Black policing practices, for instance carding, pretext stops, overcharging, unreasonable searches, and arbitrary detentions, continue to result in a high number of prosecutions.<sup>367</sup> It is, however, rarely the case that defence counsel will challenge the police’s misconduct, and if challenged it is rarely accepted by the court. Despite the reluctance from the criminal bar and the Bench, Professor Tanovich has been calling for years for courts and lawyers

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<sup>364</sup> *Supra* note 44.

<sup>365</sup> David M. Tanovich, *supra* 171; David M. Tanovich, *supra* note 40.

<sup>366</sup> Kent Roach, *supra* note 24 at 903.

<sup>367</sup> Scot Wortley, *supra* note 139.

to recognize the importance of mobilizing race in criminal litigation.<sup>368</sup> However, there have been some notable successes, most recently in *Le*. *Le* is a departure from previous jurisprudence that has avoided looking race in the eye and has maintained what Tanovich describes as the “whiteness of the *Charter*.”<sup>369</sup>

In *Le*, the police unlawfully detained and carded five racialized young men, four Black and one Asian, in the backyard of a housing unit in a low-income area of Toronto. The Asian male ran when he asked about the contents of a bag he was carrying and was chased by the police. When he was apprehended and subsequently searched, the police discovered a loaded handgun, drugs and money in the bag. The accused was convicted at trial. His conviction was upheld on appeal. The matter proceeded to the Supreme Court of Canada. A majority of the Court overturned the conviction and entered acquittals. Writing for the majority in a 3-2 split, Martin and Brown JJ. held that the police arbitrarily detained the applicant in breach of his section 9 *Charter* right. The majority excluded the evidence under subsection 24 (2) of the *Charter* as its admission would bring the administration of justice into disrepute. The majority found that the accused was detained from the moment the police officers entered the backyard. The majority’s section 9 analysis focused on how those individuals’ lived experiences as racialized men would inform their experience of police interactions, and must, therefore, be central to the detention analysis.<sup>370</sup> They also emphasized the importance of incorporating race in the detention analysis, particularly given the rise of carding and other racially biased policing strategies.<sup>371</sup>

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<sup>368</sup> David M Tanovich, “The *Charter* of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System”, *supra* note 5; David M. Tanovich, *supra* note 171.

<sup>369</sup> David M Tanovich, “The *Charter* of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System”, *ibid*.

<sup>370</sup> *Le*, *supra* note 5 at 83.

<sup>371</sup> *Ibid* at 95.

*Le* provides critical race lawyers, concerned with combating anti-Black policing, with an opportunity and a guide to the appropriate mobilization of Blackness/race under section 9 of the *Charter*. Race is no longer to be rendered silent or marginalized when making a claim of arbitrary detention or unlawful arrest by law enforcement; indeed, if race is implicated, it is to be made a central part of the detention analysis. *Le* represents a subtle but significant shift in the Court's detention analysis. Arguably, the Court incorporated a more intersectional approach in the section 9 analysis and in so doing, validated the subjective perspectives of racialized people. However, while the chill on race talk within the section 9 framework is now partially thawed, defence lawyers must avoid mobilizing race simply because the Court has given its blessing. The concern is that the uncoordinated and unprincipled use of *Le* may yield unintended results, for instance, indictments for playing the so-called "race card,"<sup>372</sup> which may ultimately serve to water down the precedential efficacy of the decision. However, if deployed conscientiously but unapologetically, the reasoning in *Le* has the potential to advance racial equality in Canada. The foregoing begs the question: will the *Le* majority's lifting of the judicial embargo on race-based *Charter* litigation have any impact on how judges address race in sentencing? It is not being suggested that the Court's acknowledgment of the role that race plays in the detention analysis is analogous to how race should be deployed in sentencing. For example, outside of the sentencing arena, a successful race-based argument may lead to the exclusion of evidence, removal of biased jurors, striking down offensive legislation and even *Charter* damages. What is the remedial value, however, in expounding and mobilizing Blackness at a sentencing hearing?

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<sup>372</sup> *Policy and guidelines on racism and racial discrimination* (Toronto: Ontario Human Rights Commission, 2005 and revised in 2009) at 17 (One of the most common myth and misconception, inter alia, about racism and racial discrimination include racialized people play the "race card" to manipulate people or systems to get what they want.).

### **Section C: Achieving Sentencing Reform with IRCARs/CIARS (Potential and Pitfalls)**

A pitfall of mobilizing race at sentencing via IRCARs/CIARS is the possibility that such an approach may diminish the social and political realities of Blackness. For example, Blackness may be disembodied from how it is socially and politically produced, which can compound existing structural violence. Blackness is a “product of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality: rather, races are categories that society invents, manipulates, or retires when convenient”.<sup>373</sup> There is a concern that the narratives that are highlighted in IRCARs/CIARS may inadvertently pathologize Blackness. By emphasizing the traumatic ways in which Blackness impacts Black Canadians, and offenders, in particular, may serve to convert IRCARs/CIARS into a pseudo-mental health style report.<sup>374</sup> Such a report may provide credence to outmoded notions of Black peoples’ dangerous dispositions and mental fragility. As Anthony Peterson aptly remarked: “any mention of race will necessarily involve heroes and villains, angels and demons, winners and losers.”<sup>375</sup> Race talk is value-laden. While “race is not real, it matters.”<sup>376</sup>

There is a general resistance by judges to permit any explicit discussion of race during the criminal process, both at the guilt phase and at sentencing. What does this mean for lawyers who seek to mobilize race at sentencing? In one sense, defence lawyers who seek to use IRCARs/CIARS to explicitly discuss race at the sentencing phase are presenting race in a formulaic fashion at a late stage of the proceedings, oftentimes after eliding race talk throughout the trial phase. Such an approach may result in an over-exaggeration of race as a means of

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<sup>373</sup> Richard Delgado & Jean Stefancic, *supra* note 39 at 7.

<sup>374</sup> See for eg. David Milward, “Residential School Syndrome and the Sentencing of Aboriginal Offenders in Canada” (2018) 66:3 Criminal Law Quarterly.

<sup>375</sup> TEDx Talks, “Anthony Peterson - What I am learning from my white grandchildren: Truths about Race” (4 November 2014), online (video): YouTube <<https://www.youtube.com/watch?v=u5GCetbP7Fg>>

<sup>376</sup> *Ibid.*

correcting or to compensate for its erasure at other junctures. However, as it has been expressly recognized in the *Gladue* context that sentencing cannot be a panacea for Indigenous overrepresentation<sup>377</sup>, the same is correct for Black overrepresentation.<sup>378</sup> It is unlikely that systemic anti-Black racism will be eliminated by focusing exclusively on sentencing. However, to the extent that sentencing can be part of the solution, it raises the aforementioned paradox – does focusing on Blackness promote more merciful/proportionate sentences? Alternatively, does it pose the risk of backfiring insofar as it may increase the judge’s sense of the offender’s dangerousness, irretrievability, etc.? Moreover, will it irritate judges and the public, who may resist the implication that they are biased or accuse lawyers and offenders of “playing the race card”?

#### **Section D: Blackness and Criminal Sentencing (Unlikely Counterparts)**

When Blackness is mobilized as a potential mitigating factor, can it lead a more proportionate sentence? Moreover, if it can, how does it accomplish this task? To truly ‘know’ Blackness requires taking a journey through the Black experience, which may necessitate the temporary suspension of privilege. Can this journey be facilitated and guided with an IRCA/CIAR or through judicial notice? Alternatively, does it require a communitarian approach that compels the offender to embrace the impact of his crime on the integrity of the community?<sup>379</sup> For example, the Black community could demonstrate to the judge, the offender and the broader public, how the offender’s actions further complicated the already complicated journey that is Blackness. On this account, an IRCAR/CIAR should provide the judge with a map to guide him/her along their journey through Blackness. It could help him/her avoid certain

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<sup>377</sup> *Supra* note 237.

<sup>378</sup> *Hamilton, supra* note 42.

<sup>379</sup> See generally, Jennifer Llewellyn, and Robert Howse, “Restorative Justice: A Conceptual Framework” (1999). Prepared for the Law Commission of Canada, 1999. Available at SSRN: <https://ssrn.com/abstract=2114291>

stereotypical pitfalls or, worse, determinism. The journey may provide the judge with a link between Blackness as a general experience, and how Blackness acted upon the specific offender.

Blackness is dynamic and thus, no two African Canadians necessarily experience it in the same manner, which presents a challenge when there is an over-reliance on IRCARs/CIARS. These reports may inadvertently *package* the Black experience and thereby reduce it to a monolithic experience that is experienced similarly by all Black Canadians. A judge may be led to believe that a Jamaican born offender experiences Blackness similar to his Ghanaian counterpart. For example, while:

Toronto's youth violence wears the face of the Black youth as the primary target of racism.....just below the surface of this generic Black youth sits the Jamaicanization of crime. The discourse about the generic Black criminal in effect points to the Jamaican as the criminal. Likewise, other studies contest the homogenization of Blacks, highlighting how each Black group experiences and responds to violence differently. As we witness the shift from the Jamaicanization to Africanization of crime, we realize that anti-African-Black racism is also a space marked by heterogeneity. Each African group experiences it differently. The newest face is the Somalization of crime.<sup>380</sup>

There do exist certain common realities that are experienced by all Black Canadians, despite their cultural or geographic differences. For example, anti-Black racial profiling by the police is conducted with little concern about whether the suspect is Ghanaian or Jamaican. It is the offender's skin colour that attracts unwanted scrutiny. However, at the Borders, this may not be the case. A Jamaican passenger may attract secondary inspection due to the prevailing stereotype that Jamaicans, particularly Black Jamaican females, are suspected drug mules.<sup>381</sup> Thus, IRCAR/CIAR writers must be mindful that they do not essentialize the experiences of Black peoples through the presentation of a solitary Black narrative that may be alien to large sections

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<sup>380</sup> Martha Kuwee Kumsa, et al, *supra* note 75 at 25.

<sup>381</sup> Sonia N. Lawrence & Toni Williams, *supra* note 20.

of the Black community.<sup>382</sup>In some cases, pervasive myths and attitudes about Blackness may serve to override the information contained in a CIARS/IRCARS, which is due in part to the fact that the criminal justice system is not race-neutral or colour blind.

Moreover, to the extent that we are talking about reforms centred on the use of IRCARs/CIARs, we must acknowledge that this approach is not a “no-cost” or “low-cost” proposition for the individuals and communities they seek to benefit. Arguably, their production is potentially (re)traumatizing. The narratives, in the CIARs/IRCARS reviewed for this project, are not exclusive to the offenders, adducing them in to evidence before sentencing courts. It is a collective narrative that uses, and interpretation will reverberate outside of the courtroom. Blackness is often manipulated by both lawyers and clients to get the best sentence outcome possible. One defence lawyer even remarked that *“my goal is to use these reports to get the best deal for my client.”*<sup>383</sup> Another lawyer stated that *“given the judicial resistance to talking about race we must infuse the system with a sense that these are issue that must be grappled with.”*<sup>384</sup> As discussed above, the concept of Blackness is malleable and is prone to distortion. The picture of Blackness that is sometimes presented to sentencing judges via IRCARs/CIARs often aligns with many of the pernicious stereotypes that socially disadvantage Black Canadians. Thus, if used in an unprincipled fashion, these reports may solidify prevailing presuppositions about Blackness. It is questionable if a slight numerical reduction in an offender’s sentence is worth the social impact this kind of strategy will have on Black communities.

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<sup>382</sup> The urge to introduce and mobilize race-based evidence at the sentencing may be in reaction to the virtual erasure or silencing of race at all other junctures of the criminal trial process. However, defence lawyers run the risk of emphasizing race in an unprincipled fashion in order to compensate for its erasure at other stages of the criminal process.

<sup>383</sup> D.F. is a white female lawyer. This is a direct quote.

<sup>384</sup> H.D. is a white female lawyer. This is a direct quote.



Like *Gladue* reports, IRCARs/CIARs seek to contextualize blameworthiness insofar as IRCAR/CIAR writers must paint a portrait of Blackness and its connections to the offence and the offender. However, within this portrait are the images of countless individuals that are caught in the same orbit as the offender – thus, their lives are also the subject, albeit inadvertently, of review. An analysis of the offender becomes an analysis of the entire group. For example, even though Blackness does not affect all Black people equally when Blackness is essentialized for judicial convenience, the portrait purports to tell the story of an entire race. This approach can have detrimental consequences for the broader Black community that assiduously toil to sever the linkages between Blackness and crime. The offender's Black experience is informed by various forces that have resulted in his or her offending behaviour. It is not merely a reaction to the oppression that Black people experience in common, i.e. racial profiling, carding, streaming. There is, arguably, no linear or causal trajectory between anti-Black racism/Blackness and criminality. Such a theory is a limited and intellectually lazy way of understanding the impacts of anti-Blackness.

IRCARs/CIARS are designed to erect an evidentiary causeway to link the background or systemic factors pertinent to the offender and the offence. These reports require an offender to disclose information about the many ways in which he has experience structural violence. These stories are traumatic and may serve to re-traumatize the individual. Thus, the writing, collection and dissemination of the information in these reports must be trauma-informed. The offender is made to detail how his Blackness informed and constrained his choices. A positive acknowledgment may provide a cathartic relief – a sense of validation and vindication, whereas an adverse treatment may compound the layers of mistrust and antipathy that many Black Canadians have towards the criminal justice system. Therefore, sentencing reform - and

especially sentencing reform involving the use of IRCARs/CIARs - can only be justified if its positive material impacts on Black communities and individuals outweigh its costs. Furthermore, the question of whether sentencing reform (including the expanded use of IRCARs/CIARs) can have any significant positive material impact is an open one, given the intrinsic conservativeness of sentencing reform.

In assessing whether sentencing reform (expanded use of IRCARs/CIARs) can have a sufficiently positive impact to justify its use, despite its costs, it is helpful to think about sentencing in both quantitative and qualitative terms. The former requires an analysis of sentence reduction, in terms of time (quantitative), and the corresponding impact that this may have on the broader Black community. For example, is a slight reduction in time, in the numerical sense, worth the potential trauma faced by not only the offender but the Black community? The IRCAR/CIAR sentencing decisions reviewed for this thesis, except for *Morris*, revealed that the numerical reduction in sentences was negligible and tended to fit within existing sentencing ranges. Moreover, in those cases where the sentence was fixed by law, the parole ineligibility period was generally a judicial attempt at “splitting the difference” between the defence and Crown’s request. The problem is not with the efficacy of IRCARs/CIARs *per se*, rather the fact that they are designed to work within the paradigm of proportionality, and a system that measures punishment severity in quantitative terms. The impact of these reports in youth cases is more potent. In all cases, the sentencing judge refused the Crown’s application to sentence the offender as an adult. These results, however, are not solely a consequence of the introduction of IRCARs/CIARs; instead, they are due to an application of the principle of reduced blameworthiness that is enshrined in the *YCJA*. The reports instead provided the judges with rich background information that assisted them in contextualizing the offender and the offence.

A qualitative change may relate to restorative justice principles.<sup>385</sup> It might also correspond, analogously, with the *Gladue* approach, which seeks to advance more culturally-appropriate sentencing responses (qualitative) in addition to reducing over-incarceration (quantitative); though here, one must be mindful about the distinctiveness of *Gladue*, and the unique relationship between Indigenous peoples and the State. In particular, a qualitative shift could place the focus more squarely on rehabilitation and reintegration, and away from a focus on crime reduction through incapacitation and deterrence. Crucially, such a shift would not necessarily compromise the goals of crime reduction, which are not well served by the current system. For instance, there is currently a serious gun and drug problem in some Black communities across Canada, particularly in Toronto. This problem is not easily remedied as it is rooted in a long history of structural violence against Black Canadians.<sup>386</sup> Thus, a theory of sentencing that supports using a victim of structural racism as a tool for curbing the very conditions it is instrumental in creating is problematic and reinforces structural violence against Black Canadians. To manipulate and use the product of anti-Blackness (the offender and his sentence) to combat the impact of anti-Blackness (the reason why the offender is before the court) does not prevent crime. In this regard, general deterrence deflects responsibility from the State to the offender and his community for issues that are not solely their creation. It is unlikely that IRCARs/CIARs alone can promote a shift away from general deterrence. Arguably, a shift away from general deterrence would require a more radical change in sentencing policy, as it would likely require a formal change to the *Criminal Code* and not just a new interpretation of the existing statutory provisions.

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<sup>385</sup> See generally, *supra* note 376.

<sup>386</sup> Akwatu Khenti, *supra* note at 190.

From a qualitative standpoint, a sentencing judge must consider whether the offender is being sentenced in a culturally salient manner. For example, are there relevant cultural programming at the institution where he will be incarcerated or should the court use community-based alternatives for sentencing. In the *Gladue* context, for a sentence to be just, it must consider the cultural needs of the offender. As Court explained in *Gladue*:

it is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.<sup>387</sup>

Similar considerations should be had in the case of Black offenders. The Black experience, despite its diversity, share one thing in common – oppression. While this oppression is experienced in different ways, it results in collective trauma. A sentencing decision can either ameliorate or aggravate that trauma. As Duff argues, the institution of criminal sentencing serves a communicative function.<sup>388</sup> A sentence can convey messages of censure or restoration. For instance, an overly harsh sentence may signal a strong message of censure, whereas a lenient one may transmit compassion or mercy. Thus, it is critical that judges strongly consider the communicative and didactic effects of their sentencing decisions.

Black offenders may, however, embody both the role of victim and offender, making it critical for a sentencing judge to consider what communicative impact the sentence will have on the offender and his community. There is no reason to believe that Black Canadians do not share the same retributive impulse as many other non-Black Canadians.<sup>389</sup> Unlike Indigenous peoples, there is no evidence to suggest that Black peoples have “different conceptions of criminal justice

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<sup>387</sup> *Supra* note 237 at 74.

<sup>388</sup> See generally, R.A. Duff, *Trials and Punishments*, *supra* note 19.

<sup>389</sup> See for eg. Oladele Abiodun Balogun, “A Philosophical Defence of Punishment in Traditional African Legal Culture: The Yoruba Example” (2009) 3:3 *The Journal of Pan African Studies* 43.

and of appropriate criminal sanctions.”<sup>390</sup>There are, however, pressing social issues in Black communities across Canada. Judges should be empowered to take judicial notice of this fact or other compelling social context evidence, in contextualizing, and in some cases, attenuating moral blameworthiness.<sup>391</sup>IRCARS/CIARs can be deployed as a tool for restoring broken social bonds and also as a means of edifying judges, crowns and defence lawyers about the impact that criminal sentencing continues to have on Black communities.<sup>392</sup>A restorative justice approach may prioritize healing broken social bonds and repairing the diabolic image of Blackness that is pervasive in Canada. As the Court held in *R v Nasogaluak*, “a proportionate sentence is one that expresses, to some extent, society’s legitimate shared values and concerns.”<sup>393</sup>

Outside of Nova Scotia, IRCARS/CIARs have not attracted sufficient judicial buy-in. Indeed, the *Jackson/Morris* methodology has not garnered the widespread support needed to correct, or at the very least critically redress, the plight facing Black offenders in the criminal justice system. Given the inherent pitfalls associated with combating anti-Black racism via sentence reform, it may be sensible to direct the community’s limited political/social/economic capital on other potential targets. However, sentencing is a site of immense structural violence and is thereby is an appropriate platform to address anti-Blackness. Bias at the sentencing phase results in harsher sentences for similarly-situated Black offenders, thereby exacerbating the problem of over-incarceration. Despite this fact, almost no work has been done on the question of how we might promote an anti-racist agenda through criminal sentencing. Not simply by treating Blackness as something that is implicitly or unconsciously, and unjustly, aggravating; but on explicitly attending to it as a potential mitigating factor. The *Jackson/Morris* framework

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<sup>390</sup> *Supra* note 237 at 21.

<sup>391</sup> Barbara A Hudson, *supra* note 28.

<sup>392</sup> *Supra* note 376.

<sup>393</sup> 2010 SCC 6, [2010] 1 S.C.R. 206 at 49.

provides a jurisprudential basis, albeit flimsy, for addressing Blackness in the sentencing process by grounding the Black experience in the proportionality analysis. It does so by examining how the offender's experience through Blackness connects to the crime and the offender's personal responsibility.

Blackness is complex factor that is often overlooked by judges. It may, however, be challenging to precisely understand what must be done with Blackness in order to redress or address structural violence. This issue has recently come to the forefront of race-based *Charter* litigation but has received minimal consideration in the sentencing context. It is accepted that anti-Blackness may result in over-policing, but does it render the offender less culpable? Some of the Black ex-offenders interviewed for this study, perceived their Blackness as a form of restraint in how they conduct their daily lives. The IRCAR writer interviewed for this project, also remarked that Black people's choices are constrained due to anti-Black racism. When asked to explain her observation, she commented that "Black people are punished for simply trying to survive the conditions created by anti-Black racism."<sup>394</sup> The decision to engage in criminality is thus not a voluntary act *per se*, but rather one that is the by-product of structural racism. In a sense, a Black offender may embody two positions - victim and offender. He is the victim of a cruel system that simultaneously shapes and curtail his choices. The Blackness that he experiences is not of his own construction. He inherited it along with all the consequences that flow from that condition.<sup>395</sup>

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<sup>394</sup> C.S. is social worker and assistant professor. This is a direct quote. See also, Paul Butler, *supra* note 50.

<sup>395</sup> For many, it is nearly impossible to alter this condition or as Irene Watson, an Australian Indigenous scholar remarked get from under the "table cloth" of the oppressor to rediscover, reaffirm and revitalize who they are. Indeed, similar to the plight of Indigenous peoples, in both Canada and Australia, Black Canadians are laden down with the invidious and pernicious legacies and ongoing atrocities of white supremacy. Arguably, white supremacy continues to gain ground partly, through what scholars refer to as social death. Social death is a symptom of colonialism, and slavery. To truly destroy a people, it is necessary to snuff out the very '*thing*' that bids life. For Watson, key to this life force for Australian Indigenous peoples is Ruwe (the 'Land'). However, as a consequence of

Anti-Blackness does not only destroy Black bodies but is instrumental in the wholesale destruction of communities. Akwasi Owusu-Bempah asserts that:

what little research that exists concerning Black Canadian offenders indicates they are over-represented among homicide offenders in some urban areas such as Toronto. Survey data from Toronto indicate Black Canadian youth may be somewhat more involved with violence such as assaults than other racial groups.<sup>396</sup>

Indeed, all the cases reviewed for this thesis involved Black men engaged in violent behaviour. While there is no statistical or biological correlation between Blackness and crime, these cases may imply otherwise. In some sense, the use of IRCARs/CIARS may lead to a situation where an offender's Blackness is highlighted in cases involving crimes that are often associated with Black criminality. Thus, creating an association that is a contributing factor to the racism that leads to over-representation and necessitates the use of CIARs/IRCARs in the first place.

However, as mentioned above, in some situations, the offender is also victimized, which assumes that society ought to bear some of the responsibility for the offender's actions. Such a characterization of victimhood may serve to diminish the seriousness of the crime committed and the justice that the victim and the wider public deserves. In *R v "X"*, for example, the young person shot his cousin in the stomach with a hunting rifle. In *Gabriel*, the offender shot and killed his cousin. In both cases both the victims and the offenders were Black, and the offence

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the colonial project Indigenous peoples are increasingly being disconnected from Ruwe, and thereby themselves. Watson asserts that her connection to Ruwe was not extinguished by the colonial wave. She declares: "I remain who I am, beneath the layers of invasion, colonisation and rape". Nonetheless, despite Watson's defiant and resistive declaration she asserts that the "process of colonialism in the end become self-colonising". She makes that remark in the context of the conspicuous manner in which the colonial project is being furthered by Indigenous Peoples. The same can be said in the Canadian context. In her seminal work on sexual violence in Indigenous communities, Hadley Friedland discusses the high level of sexual crime in Indigenous communities and the existential crisis being faced by their denizens in how to address these violent issues in a cultural appropriate manner. Black Canadians similarly struggle with self-enslavement/colonization in their own fight for emancipation. As reggae icon Bob Marley once remarked "emancipate yourself from mental slavery, for none but ourselves can free our mind". It is within the minds and souls of Black peoples that there exist the new frontier of slavery and anti-Black racism. As Franz Fanon asserted, "it is all too true that the major responsibility for this racialization of thought, or at least the way it is applied, lies with the Europeans who have never stopped placing white culture in opposition to the other noncultures."

<sup>396</sup>Akwasi Owusu-Bempah, *supra* note 6 at 78.

involved the violent use of a firearm. The CIARs in both cases provided the respective sentencing judge with a veritable blizzard of social context and background information about both offenders. This information may shed light on the circumstances that precipitated the offence and explicate the moral blameworthiness of the offender. However, and as held in *Ipeelee*, this background information should “not operate as an excuse or justification for an offence.”<sup>397</sup> It is not being suggested that the intended purpose of IRCARs/CIARs is to provide a race-based excuse or justification for the offending behaviour of a Black Canadian. Any approach to sentencing that seeks to package or essentialize Blackness to explain a Black offender’s actions is fundamentally flawed. Such an approach would be an affront to dignity and serve to support a deterministic theory of crime.<sup>398</sup>

There is an issue with highlighting an offender’s Blackness/race in order to prevent unfair attention to his race/Blackness. As discussed earlier, the criminal justice system is instrumental in constructing certain ‘truths’ about race and crime, which may unconsciously lead to the conjuring of a particular suspect profile. This is in large part due to how our system of criminal justice brands criminality. Over-emphasizing Blackness at sentencing may result in the offender’s race being placed on trial. Sentencing judges may feel the need to determine if the offender’s particular brand of Blackness is causally linked to the offence. There are no inexorable links between Blackness and crime, aside from those that are constructed through anti-Blackness. Unfortunately, these links are not merely the product of racists, but may also come from within the Black community. One ex-offender interviewee stated that “*there is a link between Blackness and crime, especially when it comes to drugs and guns.*”<sup>399</sup>

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<sup>397</sup> *Supra* note 29 at 83.

<sup>398</sup> See generally, Farah Focquaert, Andrea Glenn and Adrian Raine, “Free Will, Responsibility, and the Punishment of Criminals” in Thomas A. Nadelhoffer, *The Future of Punishment* (New York: Oxford University Press, 2013).

<sup>399</sup> S.L. is Black female ex-offender. This is a direct quote.



I found in my own experience that whenever police me, they always asked if I had a gun or any drugs on me. The constant bombardment from the media, police, and community members and even in our jurisprudence about the linkages between Blackness and violent crimes, i.e. guns and drugs, serves to reinforce already entrenched notions about Black criminality and dangerousness. It is against this backdrop that Black bodies are sentenced. Thus, an overemphasizing of Blackness, albeit in an effort to attenuate these linkages, may actually serve to amplify an already entrenched issue. Most of the ex-offenders expressed reluctance in raising their race during sentencing because they believe that they should be judged based on other factors, i.e. the offence. A majority of them stated that they only wanted to be treated as a white offender. One ex-offender commented that “*it should be what you did not your race that should be considered.*”<sup>400</sup> Another one explained that “*if you commit a crime, then it should not matter the race and culture of the person.*”<sup>401</sup> It would appear that they desired a sentencing regime that was race-neutral and colour-blind. One that focused less on their race, and more on the offence. Their aspiration is puzzling given that in many cases, the offence is a result of anti-Black racism and other forms of structural violence.

Sentencing reform, however, is not a panacea for the problem of the over-criminalization and mass incarceration of Black Canadians, and the broader problem of anti-Black racism. Moreover, criminal sentencing is one point along a continuum of structurally violent mechanisms targeting Black bodies. Indeed, the over-incarceration of Black Canadians is systemic in scope and is supported and sustained through various institutions. Thus, criminal sentencing may be a poor platform to address and remedy a social issue of this magnitude.

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<sup>400</sup> M.J. is a 38-year-old male Black ex-offender. This is a paraphrased from the original comment for clarity and grammatical correctness.

<sup>401</sup> M.W. is a 38-year-old Black male ex-offender. This is a direct quote.

Moreover, the over-incarceration of Black bodies also relates to the general problem of anti-Black racism and the ways in which it infects the criminal justice system. Arguably, there is some danger in seeking sentencing reform via IRCARS/CIARS, given that racism is an ordinary, common and intractable feature of the criminal justice system.<sup>402</sup> Thus, sentencing reform may not be considered a workable solution to the problem of the over-criminalization and over-incarceration of Black bodies and the broader problem of anti-Black racism. There is a concern that seeking change in such a hostile system is undesirable or, worse, impossible. This form of nihilism is a tenet of the structural determinism thesis, which explains that “the idea that our system, by reason of its structure and vocabulary, cannot redress certain types of wrong.”<sup>403</sup>

However, CRT scholars assert that innovation is key to law reform.<sup>404</sup> It is well established that one of the primary causes of Black over-incarceration is the fact that Black offenders often receive disproportionately higher criminal penalties compared to their similarly-situated white counterparts; and as such, one goal of progressive criminal justice reform should be the promotion and facilitation of proportionate sentences for African Canadians. IRCARS/CIARs are designed to highlight specific cultural, social, and political mitigating factors that ought to be considered in the sentencing of African Canadian offenders, which raises the following concern, namely: can CIARs/IRCARS be salutatory in the context of our current sentencing regime? There is an activist dimension to the CIARs/IRCARS movement, insofar as proponents seek to use them to transform the current sentencing regime. From a CRT perspective this form of resistance is laudable. CRT scholars/activist “not only tries to understand our social

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<sup>402</sup>Richard Delgado & Jean Stefancic, *supra* note 39 at 7.

<sup>403</sup>Richard Delgado & Jean Stefancic, *supra* note 39 at 26.

<sup>404</sup>*Ibid.*

situation but to change it: it sets out not only to ascertain how society organizes itself along racial lines and hierarchies but to transform it for the better.”<sup>405</sup>

In *Morris*, Justice Nakatsuru, while considering the role that leniency ought to play in the sentencing of Black bodies explained the following:

[83] But let me be real for a moment. The new charges does mean that there are grounds to believe that your time while on bail on these charges have not gone smoothly. Some may question why I am giving you leniency. For a 15-month sentence is a lenient sentence. Some may argue that you are not worthy. That you have failings. That you have not yet shown to have turned your life around.

[84] In my opinion, we have to get past this idea of waiting for the perfect person to be lenient. Waiting for the most benevolent soul by the standards of the privileged and the few, before we decide to extend consideration for leniency. For we may be waiting a long time. The young man who makes the choice to pick up a loaded illegal handgun will not likely be a product of a private school upbringing who has the security of falling back upon upper middle class family resources. Rather, he is likely to be a product of oppression, despair, and disadvantage. Likely he is someone who cannot turn his life around on a dime even if he wanted to. In short, he is you, Mr. Morris.

[85] So in the final analysis, what makes this sentencing different from other cases where leniency was not given is that I have been given a wealth of information to sentence you. Information that can be used to take further steps to deal with the over-incarceration of Black people in this country.<sup>406</sup>

Justice Nakatsuru does not cite any precedent or authority for his analysis, except for the information he received via the IRCAR and his own judicial notice of the plight faced by the accused and members of his community. However, there is a concern that the Court of Appeal may mistakenly construe IRCARs as a sophisticated (and expensive - not just in terms of money, but the psychological burden placed on the offender and his/her community) plea for mercy and not as a tool of mitigation within a proportionality-based sentencing regime. Mr. Morris is the proverbial poster boy, which is supported by ample empirical sources for a significant subsection of the Black community. As the court noted, Mr. Morris is the product of oppression, despair,

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<sup>405</sup>*Ibid* at 3.

<sup>406</sup>*Morris*, *supra* note 279 at 83-85.

and disadvantage. He embodies the unenviable qualities that beset a majority of the thousands of Black men that are funnelled through the criminal justice system each year. Therefore, it is questionable whether mercy, even as a countervailing concept, to correct a *bona fide* social wrong, is what the Black community, whose collective backs IRCARs/CIARs sit atop, is a worthwhile objective to pursue. In this context, mercy requires a plea to the conscience, compassion and magnanimity of the presiding jurist. It seems to require a dereliction of his/her judicial duty in advancement of racial justice.<sup>407</sup> Mercy, however, may not simply be a plea to the benevolence of sentencing judge.

Given that our system of criminal justice is skewed towards the over-punishment of racialized offenders, some scholars have advocated for the introduction of mercy into criminal sentencing as a means of correcting for this “punitive turn.”<sup>408</sup> CIARs/IRCARs are designed to alert judges to mitigating factors that should properly inform a proportionate sentence, and is thus consistent with a retributivist system. On this account, giving someone a lower sentence in light of a CIAR/IRCAR is not merciful; the sentence is proportionate given the lower level of blameworthiness evinced by the CIAR/IRCAR, and thus the sentence is appropriate from a retributivist perspective. Alternatively, one could argue that a CIAR/IRCAR is designed to

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<sup>407</sup> As discussed above, I was once the recipient of white judicial compassion. I am not sure if my race or age played a role in the judge’s decision, but one thing was clear – my life was in that judge’s hands. His decision prompted me to begin to seriously consider the path that I was on. Did I deserve leniency? In my mind, I didn’t believe so. I thought that I was too far gone. I had been warned plenty of times before by judges, Crowns, police officers, family and friends to give up my lifestyle. However, none of them provided me with a suitable alternative. I was 23-year-old father of 4 children who had dropped out of high school and sold drugs to make a living. My life was eerily similar to all of the offenders in the cases that I reviewed for this thesis, and the ex-offenders I interviewed. All of my friends and some of my male family members were involved in street-level criminality. Many had criminal records, and some were deported or going through deportation proceedings. Even my older brother and two of our friends were charged with 1<sup>st</sup>-degree murder. It was within this environment that I discovered a different notion of Blackness. Like Messrs. Morris and Jackson, owning a gun was a requirement. Indeed, on two occasions when I was arrested there was a gun in the car. Never on my person, however. So, whenever I appeared before a judge, I expected the worse because my life was surrounded by disappointments. Therefore, the last person I expected to seek salvation or compassion from was the person that embodied all the reasons that caused my situation.

<sup>408</sup> Carol Steiker, “The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System”, *supra* note 222 at 222; Carol Steiker, “Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration”, *supra* note 226.

promote a more empathetic, holistic, *merciful* sentencing process that treats criminal sentencing as a site for countering or counter-balancing anti-Black racism in society and the criminal justice process. This latter claim might lead us to say: the proposed sentence is disproportionately low but is justified by countervailing considerations. However, it is often argued that mercy is incompatible with justice and thus has no place in criminal sentencing. For example, one may perceive mercy as undesirable, given that it necessarily involves the performance of power differentials, whereby an empowered individual chooses to extend a benefit to which the disempowered individual has no right to claim, and is expected to receive in a spirit of gratitude. This conceptualization of mercy seems to track with notions of degradation and serves as an affront to human dignity. The following quote nicely summarizes the potential of deploying mercy as a public value in Canadian sentencing law:

the place of mercy in Canadian penal justice is little developed in our jurisprudence. There is a deep uncertainty whether mercy can be accommodated within the positive law of sentencing or recognised only as an exceptional reason to depart from the ordinary principles of the positive law that would apply in a given case. In a narrower form mercy is apparent in some notions of mitigation for personal hardship. It may be seen also in decisions that seek to redress deprivations that would be cruel or pointless. But, in a broader sense, perhaps the most fertile ground for mercy is where the lawful power of courts can be used to allow hope to flourish if there is a chance of success. If there is such a chance, it may be argued that mercy provides a sufficient reason to depart from the path that would otherwise be dictated by retributive objectives within the positive law of sentencing.<sup>409</sup>

There is value in mercy, especially in situations where mercy tempers the mad fervour to punish without due consideration for structural violence. Mercy does not track with degradation if it is conceptualized as a bilateral grant; rather than the performance of power differentials. IRCARs/CIARs can facilitate and promote a two-way flow of mercy wherein power relations are flattened, and dignity is made a central consideration in sentencing determinations. The proposed approach imagines a situation whereby the State seeks mercy from Black Canadians by

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<sup>409</sup> *R v Zaher*, 2017 ONSC 582 (CanLII) aff'd *R v Zaher*, 2019 ONCA 59 (CanLII) at para 13.

providing quantitatively and qualitatively better sentences for Black offenders, and in turn, a Black offender may feel morally emancipated when he or she makes a plea for mercy. Such an approach can be considered as a *shared grant of mercy*. One in which both parties, the State and Black offenders, seek and grant mercy. This approach is a dignity affirming compromise. It is not about compensating for past wrongs; instead, it serves as the repatriation of stolen/lost dignity.

### **Conclusion**

In the end, IRCARs/CIARS may be a call for mercy, not as a sovereign grant, but as a recognition of the cruelty that often ensues when mercy is eschewed. Perhaps the connotations that generally travel with the concept of mercy is unfortunate. However, when conceptualized as a mechanism that promotes hope and redresses social deprivations, one may argue that semantics are insignificant. As Justice Nakatsuru aptly remarked: “in my opinion, we have to get past this idea of waiting for the perfect person to be lenient. Waiting for the most benevolent soul by the standards of the privileged and the few, before we decide to extend consideration for leniency. For we may be waiting a long time.”<sup>410</sup> In a sense, CIARs/IRCARs invite sentencing judges to take a chance on a Black offender and in so doing, infuse his or her life with hope. There is no guarantee that the offender will not re-offend, but this is hardly a reason to deny them an opportunity that was conspicuously absent in his or her life.

The judge in my sentencing hearing did not have the value of an IRCAR/CIAR, but as with so many Black men, my Blackness was difficult to conceal. Any attempt at concealing or erasing Blackness is futile. The fact that IRCARs/CIARs force judges and prosecutors to grapple with these issues, despite the inherent pitfalls, is a laudable step in combatting anti-Black racism

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<sup>410</sup>*Morris, supra* note 279 at 84.

in criminal sentencing, and in the broader criminal justice system. Sentencing reform is at best, only a partial solution to the structural violence endured by Black Canadians. There is, however, a chance that by addressing anti-Blackness at a site where Black bodies are routinely degraded, we may force a more honest confrontation of Black over-incarceration. Ultimately, the more profound paradox of visibility may be this: in our society, there is a direct correlation between the impossibility of looking past Blackness, and the unwillingness to look at anti-Blackness. If looking more closely at Blackness makes it harder for the criminal justice system to look away from anti-Black racism, then we will have achieved an incomplete but not insignificant victory.

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## **Appendices**

### **Appendix A: Sample Questions for Defence Lawyer Participants**

1. What do you consider to be the purpose(s) and/or objective(s) of sentencing?
2. Are you usually satisfied that the sentence received is reasonable? If so, why? If not, why not?
3. Are you concerned at times that factors such as race may affect the sentence given? If so, why do you think so?
4. Have you experienced what you would describe as unfair or unreasonable sentencing when representing non-white clients? Can you elaborate by way of specific case experiences?
5. Do you think that there is a relationship between race and crime? If so, can you explain why?
6. In your view, should consideration(s) be given to an offender's race when he/she is being sentenced? If so, why or why not? Explain what factors/issues should be taken into account for sentencing?
7. Do you think that the historical and general mistreatment of African-Canadians affects the outcome when an individual member of that group is being sentenced for a crime he/she committed?
8. Some argue that, in general, Aboriginal and Black offenders have been over-incarcerated? Do you have any thoughts on the over-incarceration of Aboriginal and Black offenders?

## **Appendix B: Sample Questions for non-Lawyer Participants**

1. Are you concerned at times that factors such as race may affect the sentence given?  
If so, why do you think so?
2. In your view, should consideration(s) be given to an offender's race when he/she is being sentenced? If so, why or why not? Explain what factors/issues should be taken into account for sentencing?
3. Do you think that there is a relationship between race and crime? If so, can you explain why?